This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Int 2300.1

Harvard College Library

FROM THE

J. HUNTINGTON WOLCOTT FUND.

Established by ROGER WOLCOTT (H. U. 1870), in memory of his father, for "the purchase of books of permanent value, the preference to be given to works of History, Political Economy, and Sociology." (Letter of Roger Wolcott, June 1, 1891.)

Received 8 Dec. 1894.

CHAPTERS ON THE PRINCIPLES

OF

INTERNATIONAL LAW.

London: C. J. CLAY AND SONS,
CAMBRIDGE UNIVERSITY PRESS WAREHOUSE,
AVE MARIA LANE,

AND

STEVENS AND SONS, LIMITED,
119 AND 120, CHANCERY LANE,
LAW PUBLISHERS AND BOOKSELLERS.

Cambridge: DEIGHTON, BELL AND CO.
Leipzig: F. A. BROCKHAUS.
New York: MACMILLAN AND CO.

CHAPTERS ON THE PRINCIPLES

OF

INTERNATIONAL LAW.

BY

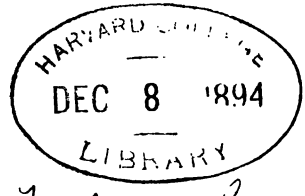
JOHN WESTLAKE, Q.C., LL.D.,

WHEWELL PROFESSOR OF INTERNATIONAL LAW IN THE UNIVERSITY OF CAMBRIDGE;
LATE FELLOW OF TRINITY COLLEGE, CAMBRIDGE;
HONORARY LL.D. OF THE UNIVERSITY OF EDINBURGH;
MEMBER AND LATE VICE-PRESIDENT OF THE INSTITUTE OF INTERNATIONAL LAW.

CAMBRIDGE:
AT THE UNIVERSITY PRESS.
1894.

[*All Rights reserved.*]

W.8189
Int 2300.1



Wolcott fund.

Cambridge:

PRINTED BY C. J. CLAY, M.A. AND SONS,
AT THE UNIVERSITY PRESS.

PREFACE.

THIS book is not a detailed treatise on international law, but an attempt to stimulate and assist reflection on its principles. It is primarily intended in part performance of a professor's duty to his university, though not without hope that it may be of use to others as well. International law being the science of what a state and its subjects ought to do or may do with reference to other states and their subjects, everyone should reflect on its principles who, in however limited a sphere of influence, helps to determine the action of his country by swelling the volume of its opinion. Indeed to prepare men for the duties of citizenship is the chief justification for introducing into education a subject which, on account of its inevitable defect in precision, is less suited as a training for the mind than as an exercise for the trained mind. Again, international law is not a highly technical subject, and it would be a mistake to aim at giving it more technicality by the mode of treating it. The law of a country is bound by

written enactments and recorded judicial deliverances, and the procedure for applying it is as fixed as the law and by similar means. Hence arise struggles between the letter and the spirit, and the spirit receives no effect unless means can be found of bringing it within the letter. But there is little of the letter, little of express convention or authoritative formula, to enter into the problem of determining the duty of a state towards its neighbours. If any one says that the technical duty of a state is to take or abstain from taking a certain course, but that in the given circumstances it may justifiably act otherwise, we may be pretty sure that he had no sufficient reason for laying down the technical duty in the terms which he has chosen. On more than one ground, therefore, there ought in this case to be less than the usual difficulty in combining academic and general readers.

In the first chapter the reader is invited to consider shortly the place of international law among the sciences, and in what sense it is law. This is necessary because the writers on our subject speak much of a law of nature, which has to be distinguished from the laws of nature familiar to us in what are called the natural sciences. It is also necessary because of the dominant position which certain views of John Austin have held in the English universities, as to which therefore I must ask the general reader to excuse a few sentences which will scarcely interest him. That eminent thinker rendered great service by elucidating the various elements, psychological states and states of fact, which have to be provided for by the law of country, and the knowledge of which makes up

larger part of what in the English universities is called jurisprudence. But he prefaced his system by analysing the law of a country into commands addressed by a sovereign to subjects, including in his description of the sovereign all those who participate in the supreme authority. And the definition of the law of a country which resulted from that analysis he gave as the definition of law, so that international law, not being set by an Austinian sovereign to Austinian subjects, was in his view not law at all, but what he called positive international morality. Now this was beside the mark of what followed in his own lectures. In elucidating the elements with which the law of a country must be concerned Austin found no use for his definition of law, perhaps it was impossible to find any; and thus we are fortunately able to retain most of the fruits of his labour, unaffected by the doubt which has at last arisen about that definition.

What is called the historical school contends that Austin's definition is not applicable to law in all states of society or under all political systems, in particular that customary law often exists in communities in which they tell us that no Austinian sovereign issuing Austinian commands can be pointed out; and they bid us begin our study by enquiring what law has in fact been in its various forms, from the earliest times which can be traced, and from the rudest savages that can be found, to the most highly organised of modern states. Those on the other hand who demand that some clue shall be given before that labyrinth is entered are called the analytical school, and in England it has been too often assumed that no one can belong to the

analytical school without accepting Austin's definitions. I am keenly sensible of the interest and value of historical and even of prehistorical investigations, informing us of institutions and states of society remote from our own. We learn from them how the different peoples whom we study usually conducted themselves with regard to family, property, or any other matter which in our actual England is regulated by law; by what beliefs and motives, and by what commands or compulsion if any, their conduct was kept to its usual lines. And by accumulating a number of such investigations we learn how what we now know as the law of a country has arisen. But the analytical school are certainly right in maintaining that, if we give the name of law to anything which we so discover in a remote state of society before we have fixed in our minds what we mean by that name, we beg the question, and have no security that our language has any consistent, or therefore useful, sense.

It does not therefore seem to me admissible to dispense with an analytical enquiry into what we mean by law, but whatever merit Austin's analysis may have for the law of a country, his treatment of international matters appears to be inadequate, as notwithstanding his great ability it well may have been from his not having given them much attention. We may grant, though it has been disputed, that a sovereign in his sense, the commanding part or body, may always be found in a state if looked for carefully; also, what cannot be disputed, that no commanding part or body can be found among the states of Europe and America. Still, it will not follow that there is nothing in the

intercourse between those states which can be more properly classed with law than with morality. Whether that is so must be determined by observation, and observation will probably bring us back to certain very ancient conclusions. We may find that, besides approving conduct as moral or reprobating it as immoral, men distinguish the morality which they deem from that which they do not deem themselves justified in enforcing; that every society tries to express that distinction in rules suitable to the purpose for which it exists, and acts on it with more or less consistency; that the nation with its law is merely the strongest case in point; and that another case, not less real because weaker, is presented by the society of states with its international law. And we may find an incidental advantage in having cleared the foundations of our subject from Austin's nomenclature. His definition of a sovereign included that the person or body called by that name should not only be the commanding portion of the state, but should not be, himself or itself, subject to any commands, in other words, should be independent. Now sovereignty and independence are terms of international law, but at least in that science they belong to the state as a whole and not to any part of it. In the system of Europe and America a state is accepted as a unit, whatever may be its internal constitution. It is the state, and not the Austinian sovereign within it, that is sovereign and independent. Consequently an attempt to adhere to the nomenclature which we have rejected might have led to confusion, and to enquiries, irrelevant to international law, as to where in any political body the Austinian sovereignty lies.

We can now return to matters of more general interest. The international lawyer is in search of the rules existing in the international society and more or less enforced by it, but very few of those rules have been laid down by conventions between states. They must be looked for in the practice of states; but when a practice is quoted as carrying authority, it must be further shown that it has not consisted of a number of purely voluntary acts or abstentions, but that the thing has been done or abstained from in obedience to a persuasion that such was the law. Thus the appeal to practice obliges us to join with it the study of opinion, and there are cases in which we are driven to the study of opinion alone, because no practice may exist on the point in question, or because we may be called on to recognise that, through a change of opinion, an old practice has ceased to be accompanied by the general persuasion of enforceable right without which it cannot be law. We also have to examine the history of international relations for the purpose of seeing how far in different ages a real society has existed between states; from what date the society which now exists between them in Europe and America may be reckoned, so that its practice may be quoted as carrying authority; and how the development of opinion has been connected with the changes in international relations. All this forms a complicated investigation, the parts of which act and react on one another, and the historical method seems to be the best for entering upon it. Therefore in the chapters from the second to the fifth I ask the reader to accompany me from ancient Greece to the middle of the eighteenth century, confining his atten-

tion to the most important events and thinkers, for which alone there is room in so short a sketch, but to which, even in a larger work, it would be desirable to introduce him before entering into further detail on any part. It has sometimes seemed to me that the brief accounts of the older writers which are given in modern treatises have lost, in passing from hand to hand, a little of their likeness to the originals, and that the points in the originals which are selected for mention are rather those to which later systems attach the most importance than those which best represent the thought of the writers. The great work of Grotius is especially one of which it would be difficult to form either an adequate or even a correct notion from the few lines in which his opinions are usually mentioned, and some pains have here been taken to represent it as it is. The Peace of Westphalia has been dwelt on with insistence, as marking the era from which the existing international society dates, and as giving important help towards understanding its nature.

It is, or ought to be, familiar to all who have engaged in these studies that communion of thought between England and the Continent meets with a certain difficulty from the fact that *jus*, *droit*, *recht*—in Latin, French and German—combine the two meanings of law and right, which in English are so sharply distinguished that there is no word combining them. Latin, though as widely known in England as in any other country, does not make us sufficiently alive to the circumstance, because law, which to an Englishman is apt to appear the more important meaning of the two, is also the predominant meaning of *jus*. But

droit and *recht*, when not used with a definite reference to the law of a country, seem to carry to a French or German ear a sense of which the nearest English equivalent would oftener be right than law. This does not place the continental thinker in Austin's point of view. The international right which he understands by *le droit international* is something more than that conduct which is entitled to moral approval. It is a true jural right, which, as he holds, not only ought to reign but ought to be made to reign in the conduct of states. But there is a difference between him and the English thinker. Both those who speak of international law and those who speak of *le droit international* may regard their subject as being the body of rules of a society, but the former would think primarily of the rules, and then of the right as ordinarily measured by them, the latter primarily of the right, and then of the rules as ordinarily embodying it. Both may regard the rules as to be obeyed, subject to exceptions, but the former would regard the exceptions as matter rather for casuistry than for law, while the latter would see in them the vindication of a higher jural right. The practical difference would be most felt when the change of a rule was advocated. Those whose prepossession was chiefly with law, while unable to contend that in the absence of an organised legislature law might not be changed by the same power of opinion which had established it, would be slow to admit the change. But those whose prepossession was chiefly with right would be impatient of the continued existence of any rule which they no longer believed to embody it. The prepossession with right, though not necessarily united with the notion of

abstract or primary rights inherent in persons and states, is apt to lead to it: towards the end of the historical chapters I have introduced the reader to that notion in speaking of Wolff, who made it one of the foundations of his system. All the more important considerations having, it is hoped, been brought forward and received some discussion in the pages thus far referred to, I proceed in Chapter VI to the delicate task of laying down the general principles of international law in short form. My point of view is that of law, and I think that the paragraphs which I have drawn up express what is generally held in England, while the more moderate of those who set out from right will perhaps not substantially dissent from them, though for themselves they would have expressed some of them differently.

Coming now to particular principles, Chapter VII explains those concerning the legal equality of states, their political inequality, and the position and protection of the subjects of a state when in foreign countries or contracting with foreign governments. These are matters which, if we set out from the idea of primary rights, would fall under those of independence and equality. Chapter VIII deals with what, in such a system, would be placed under the primary right of self-preservation, and discusses the alleged right and the actual rules relating to the matter.

Chapter IX is devoted to the nature and acquisition of territorial sovereignty, with the allied topics of protectorates in uncivilised regions and spheres of influence, and contains much on which controversy may be expected. It is based on a sharp distinction

between territorial sovereignty and property, with a consequent abandonment of those arguments relating to the former which have been derived from the Roman law as to the latter or from feudalism. This position has not been previously taken up by any English writer, and it was necessary to fill the void by a new treatment of the title to territorial sovereignty, especially in uncivilised regions, with regard to which the Roman doctrine of occupation as a natural mode of acquiring property had been made to do duty. Hence again it was necessary to consider the relation of civilised powers and their international law to uncivilised natives, and the nature and limits of the rights which such powers and their subjects can possibly derive from the natives by the treaties which have been so much in vogue in Africa. The great human interest of that question would of itself have been a sufficient motive for its introduction into this book, even had it not been required for the scientific purpose mentioned. My views as to natives and treaties with them, and on inchoate titles and the conditions for their completion, have already been published in the *Revue de Droit International*, in connection with the disputes of a few years since between England and Portugal. In dealing with protectorates in uncivilised regions, I have pointed out the radical distinction between them and protectorates over states, and have tried to put this new form of territorial aggrandisement on its proper and independent basis.

Chapter X is an attempt to make the British position in India scientifically intelligible. Here again the great interest of the subject would have justified its

introduction, even did not our position, and t... by which it has been attained, illustrate more tha... of the principles that have formed the topics of ... preceding chapters. The discussion which the subject here receives has been greatly facilitated by the recent publications of Mr Tupper and Mr Lee-Warner, but it had already occupied my attention.

PAGE
155
160
63

The eleventh and last chapter of the present series treats of the principles of the laws of war as between belligerents. Attention has been drawn in it to the extreme license on the ground of necessity which has received a certain scientific sanction from one of the contributors to the important Handbook of International Law edited by the late Professor von Holtzendorff.

The title of chapters which has been chosen instead of that of essays implies a certain connection and sequence in their subjects, which the foregoing summary may show to exist. But several more chapters would have to be added in order to make this a complete work on the principles of international law. My intention in planning it included one on the principles of neutrality, and another giving examples of the growth of international law, in which one would have borne on neutrality. These have been postponed because it was found that a more elaborate treatment of that subject would be necessary than would have been in proportion to the scale of what is now published. The rights and duties of neutrals are the part of international law which has changed most since the time of Grotius, and with regard to which ideas tending to further change are still the most rife; and I hope to

between thorough examination of its principles at no consent time. Meanwhile it is trusted that the present to ume may furnish students and others with matter for reflection, and assist them in attaining clear notions, on the nature of the society formed by states and on many parts of their mutual obligations.

J. WESTLAKE.

8th September, 1894.

CONTENTS.

CHAPTER I.

INTERNATIONAL LAW IN RELATION TO LAW IN GENERAL.

	PAGE
International Law the Body of Rules between States . . .	1
Law and Society	2
Jural Laws and the Laws of Nature known to Science . .	4
The Society of States compared with other Societies . . .	6
A special point of Contact between International and National Law: Private International Law	9
Another special point of Contact between International and National Law: Territory and Property: Natural Law, or the Law of Nature as a Jural Conception	10
n's Limitation of the term "Law"	11
ral Law	15
d Wrongs	16

CHAPTER II.

ARING ON INTERNATIONAL LAW DOWN TO THE RENAISSANCE.

. . . . .	17
. . . . .	18
. . . . .	22
an empire: Isidore of Seville . .	23
. . . . .	25

CHAPTER III.

AYALA: GENTILIS: GROTIUS.

. . . . .	30
. . . . .	33
AS	36

CHAPTER IV.

PAGE

The Peace of Westphalia and Pufendorff 52

CHAPTER V.

BYNKERSHOEK: WOLFF: VATTEL.

Bynkershoek 66
Wolff 70
Vattel 76

CHAPTER VI.

The Principles of International Law 78

CHAPTER VII.

THE EQUALITY AND INDEPENDENCE OF STATES.

The Independence and Legal Equality of States, and Semi-Sovereignty 86
The Political Inequality of States, and the Great Powers of Europe 92
The Equality of States in Civilisation, and the Protection of Subjects abroad 101

CHAPTER VIII.

INTERNATIONAL RIGHTS OF SELF-PRESERVATION.

Self-preservation as an alleged Primary Right 110
Rights of Self-preservation actually allowed by International Law 114
The Balance of Power 120
Alleged right of Self-preservation against the Contagion of Revolution 122
Self-preservation as a ground of Criminal Jurisdiction 125

CHAPTER IX.

TERRITORIAL SOVEREIGNTY, ESPECIALLY WITH RELATION TO UNCIVILISED REGIONS.

Territorial Sovereignty distinguished from Property 129
The Title to Territorial Sovereignty 134
The Position of Uncivilised Natives with regard to International Law 137
Government the International Test of Civilisation 141
Treaties with Uncivilised Tribes 143

PAGE

Discovery and Occupation as International Titles . . . 155
The Inchoate Title by Discovery or Occupation 160
The Ripening of an Inchoate Title into a Complete one . . 163
The Geographical Extent of International Titles in Uncivilised Regions 166
Alleged International Title by Civilising Influence exerted beyond the limits of Occupation 174
Protectorates in Uncivilised Regions 177
Spheres of Influence 187

CHAPTER X.

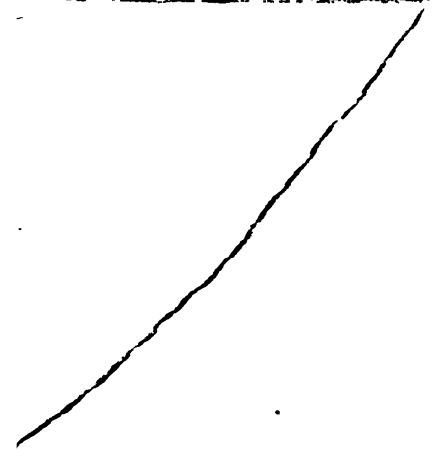
THE EMPIRE OF INDIA.

The East India Company and Companies in General . . . 190
Rise of the British Empire in India, from the point of view of International Law 193
The Empire of India in relation to International Law . . . 211
The Empire of India in relation to Constitutional Law . . . 219

CHAPTER XI.

WAR.

The Rules of War considered as Laws 232
Principles relating to Particular Military Operations . . . 236
Principles relating to the Conduct of War generally: Kriegsmanier and Kriegsraison 238
The treatment of the Peaceable Population, and of Private Property on Land and at Sea 245
Retorsion 253
The General Theory of the Relation of Subjects to a War . . 258
Humanity in War 264
The Improvement of the Laws of War 267



INTERNATIONAL LAW.

CHAPTER I.

INTERNATIONAL LAW IN RELATION TO LAW IN GENERAL.

International Law the body of Rules between States.

INTERNATIONAL law is the body of rules prevailing between states. It may also be described as the body of rules governing the relations of a state to all outside it, whether other states or private persons not its own subjects. These definitions are not inconsistent, because, where international law allows a state to have direct relations with a private person not its own subject, it is only by virtue of a rule prevailing between states that this is so. Any state may capture try and execute a pirate, whether its own subject or not. Any belligerent state may capture try and condemn a ship belonging to a neutral owner for violating a blockade established by it. This is so because it is a rule between states that his own state may not interfere for the protection of the pirate or the blockaderunner. If a state presumes to act directly against a private foreigner in a case in which no international rule excludes the state to which the latter

belongs from protecting him, the matter becomes one between the two states: the foreigner's state is injured even though it may not seek redress.

These considerations furnish the answer to a question which is sometimes asked, whether private persons can be the subjects of international law. It would be pedantic to deny that the pirate and the blockade-runner are subjects of international law, but it is only by virtue of rules prevailing between states that they are so.

Law and Society.

We have next to ask ourselves what is meant by a rule prevailing between states. It is meant that states form a society, the members of which claim from each other the observance of certain lines of conduct, capable of being expressed in general terms as rules, and hold themselves justified in mutually compelling such observance, by force if necessary; also that in such society the lines of conduct in question are observed with more or less regularity, either as the result of compulsion or in accordance with the sentiments which would support compulsion in case of need. It is an old saying, *ubi societas ibi jus est;* "where there is a society there is law." And perhaps no better account can be given of what is commonly understood by law than that it is the body of rules expressing the claims which, in a given society, are held to be enforceable and are more or less regularly observed. When a claim is urged but is not held to be enforceable, it is commonly called a moral claim as distinguished from a legal one. In order to become a legal claim it must be accompanied by the sentiment that it would be justifiable to enforce it, and that

sentiment must be shared by the general mass of some society which is concerned with the matter. If in that society the claim is not with some degree of regularity either enforced or observed without the necessity of resorting to force, it will follow that the sentiment in favour of enforcing it is wanting either in width of diffusion or in strength. The claim may be in process of becoming a legal one, but as yet it is only a moral one. On the other hand, where no claims have become legal ones, there cannot be a society in any true sense. A number of men having certain concerns in common may feel no need of a particular society with laws to regulate them, because the men themselves are included in the larger society of the state, the laws of which are sufficient for their as well as for other particular purposes. But if a number of states attempted to live with no common sentiment at the back of their mutual claims sufficient to secure some regularity and impose some limits with regard to them, disorder and violence would reign unchecked by any social bond. So the maxim *ubi societas ibi jus est* correctly puts before us society and law as mutually dependent. They must have been inseparable as facts from the earliest time at which there was any intercourse between men, probably before there was any clear consciousness of the notions corresponding to the facts, and they are still inseparable in all departments of intercourse between men. Without society no law, without law no society. When we assert that there is such a thing as international law, we assert that there is a society of states: when we recognise that there is a society of states, we recognise that there is international law.

Jural Laws and the Laws of Nature known to Science.

The law which belongs to society is a rule for human conduct. That the laws of nature in the modern scientific sense are different in kind from rules for human conduct may seem too obvious to need pointing out, but in fact the two senses of the word "law" have led to so much confusion that it is necessary to insist on the distinction between them at the outset of my subject. It will assist us if we speak of laws for human conduct, whether national or international, as jural laws. Laws of nature are statements of certain facts of nature, namely of certain invariable sequences of antecedents and consequents. Jural laws are directions. The formula of the one is "this is"; the formula of the other is "do this." Consequently laws of nature are never broken: if it were found that a phenomenon contradicting an asserted law of nature had happened, the conclusion would be that the asserted law was not one. But jural laws are broken by men's disobedience to the directions which they convey, even although the lawbreaker may be punished. The only link between the two is that the uniformity with which the consequents in nature follow the antecedents suggests the uniformity with which a jural law applies or is intended to apply to a whole class of cases. On account of that meagre analogy the term "law" has been extended metaphorically from jural laws to laws of nature, and the extension has been defended on the ground that jural laws will not be beneficial, in most cases will not even obtain any wide observance, if the facts expressed by the laws of nature are not duly taken into account in framing them. That is a true remark: a wise law-

giver must take facts of all kinds into account. But to take a fact into account is not blindly to copy it, and the metaphorical extension of the term "law" has tended to conceal the truth that one of the most important functions of jural law is not to copy but to limit and correct those habits and impulses which, regarded merely as facts, are laws of nature. Thus an impulse to defend ourselves is linked to many forms of danger by a sequence of cause and effect. The various manifestations of that impulse are proper subjects of enquiry for the natural historian, and furnish him with laws of nature so far as they are found to take place in uniform courses. But the impulse is often so strong and unreflecting that its free gratification would be incompatible with any society among men. It prompts us to ward off danger from ourselves by transferring it to innocent persons, and jural law has to distinguish and punish the cases in which it is reprehensible to yield to the impulse of self-defence. This example is an instructive one with regard to international law. The word "nature" is so suggestive of praise that self-defence, being as an impulse a law of nature, has been erected into a primary right. Writers have been found to treat the right of self-defence, not as a compendious expression for summing up those rights of defending itself which on jural principles can properly be allowed to a state in various circumstances, but as a natural source from which it may be deduced that a state may justifiably do every thing necessary for its defence. Now such reasoning is not only immoral, but it leads to no definite result. The action of the licensed self-defender exposes other states to danger, and their rights of self-defence meet that of the first state in a conflict for the solution of which no principle is

furnished. The only remedy is to bear well in mind the distinction between the laws of nature and jural laws.

The Society of States compared with other Societies.

Returning to international law as the jural law of the society of states, we have to compare that society with other forms of human association. Possessing little organisation and no officers, never indeed performing a truly collective act, the body of states might at first sight be likened to what is commonly called "society," consisting of persons interested in maintaining the rules of good breeding, or what at the time and place they consider to be such. In that loosest of all forms of association rules are maintained by the independent, though concurrent, action of individual members in shunning intercourse with those who do not observe them, and by the support which the members give to one of their number who shows resentment against a person by whom the rules have not been observed towards him. States however do not to any great extent use the shunning of intercourse as a means of enforcing international rules. The populations of different countries are too closely united by commerce, travel, intermarriage, and even by the lines of religion crossing political boundaries, for public intercourse between them through their national organs to be easily dispensed with. Permanent diplomatic intercommunion has been forced by European states on Eastern empires which were unwilling to admit it, and the withdrawal of ambassadors is either a prelude to war or a step which brings war within measurable distance, while when war ends public intercourse is

restored. In this respect the society of states is closer even than a cricket club or a trades union, notwithstanding that these perform collective acts when they enforce their rules by formally expelling recalcitrant members. The exclusion of a state from the international society is scarcely more thought of than, within a state, the expulsion of a subject is thought of as a means of enforcing the law of the land. The international society answers to a want of mankind which no one is permitted to ignore. And it is far from lacking that other mode of enforcing its rules which consists in the support given by the members to one of their number who has been injured by a breach of them. Often, it is true, a justly offended state is left in the particular case to fight its own battle, but it receives a moral support from the general recognition that its resort to arms was the exercise of a right, and the interests of states meet and cross each other at so many points that there is generally, before long, some point at which the offender is made to feel the loss of sympathy which his conduct has occasioned.

If on the other hand we compare the international society with the national one which exists by virtue of the state tie, the differences which strike us most are the collective character and overwhelming strength of the power which enforces the rules of the latter, and the great variety of topics to which those rules relate. In other words, there is in a state a sovereign authority and the citizens are in general subjection to it, while in the society of states there is no sovereign authority and the life of each is touched by international law only at a few points. A third difference, that which exists in the amount of obedience paid to international and national law respectively, does not seem to deserve

the prominence sometimes given to it. The truth is that much the larger part of the mutual relations of states is carried on with great regularity in accordance with the international law relating to the several matters concerned, and that the cases which have a contrary appearance are mostly those in which a rule is uncertain or in which the change of a rule is strongly advocated. For example, there is no universally received enumeration of the articles which a belligerent may treat as contraband of war when carried to his enemy by a neutral, nor any universally received principle on which the contraband character of a particular article may be determined, and even between enemies the progress of humanity is continually demanding some further restriction of the license of war. Hence have arisen many of the complaints of violating international law made by neutrals against belligerents and by belligerents against one another, but it is more correct to say that international law is an imperfect body of rules than that, so far as it is perfect, it is not obeyed. The want of international organisation chiefly makes itself felt, so far as concerns international rules, in the imperfection of the power to define and develop them. But that is a defect from which the law of the land is not always exempt in countries which have attained some considerable degree of advancement. Take for instance the laws of England in the period of Glanville and Bracton, say the reigns from Henry the Second to Henry the Third, when old local customs, new feudal principles and habits of action, and a good deal of Roman law, then lately made known in this country, were being fused together into our common law, and that by the judges, to whom but little express legislative help was given before Edward the First.

While the process was going on, uncertainty reigned over as large a part of the law of England as the part of international law over which it now reigns. And if we add the private violence, which then exceeded in frequency and impunity the public violence of European states in the nineteenth century, it may safely be said that international law is now not less certain and better obeyed than was the law of England till the process referred to was fairly complete.

A Special point of Contact between International and National Law: Private International Law.

Again, the comparison between international law and state law or the law of the land would be inadequate, if we left out of account that to some extent they have to protect the same interests and are therefore concerned with the same topics. It is one of the undoubted functions of a state to secure private rights over things within its territory, or disputed between persons who, through being established within its territory, are habitually amenable to its laws. But the performance of this function often involves the consideration of private rights over things situate in foreign countries, or arising from transactions which took place in foreign countries; and often disputes have to be settled between parties one or both of whom are absent from the territory or only casually present in it, and such absence or casual presence of a party is again varied by his being politically a subject of the state in question or a foreigner. Hence arises the necessity of determining, at least to some extent, the limits of a state's jurisdiction and of the application of its laws in private matters. The science of those limits is called private international law or international private law.

It is true that the international society leaves to the states which are its members considerable latitude with regard to that science, but not an unlimited latitude. A state might depart so widely from any accredited principles, in its claim to exercise jurisdiction or apply its laws, that a foreigner who suffered by such departure would be considered to have suffered an international wrong and his state would resent it. Therefore state rules affecting the interests of individuals are in some degree concerned with international principles, and a part of the body of law which regulates those interests is common ground to a state and to the society of states.

Another Special point of Contact between International and National Law: Territory and Property: Natural Law, or the Law of Nature as a Jural conception.

There is still another point of contact between national and international law, in that certain international rules dealing exclusively with public interests have been borrowed from private law. This occurred for two reasons, which it is necessary to mention here for the sake of completeness in the subject now occupying us, but which will have to be more fully treated hereafter. First, the right of a state in its territory bears a great resemblance to that of property, and the resemblance was even closer in the sixteenth and seventeenth centuries, when the doctrines of international law were assuming shape, because the feudal confusion between government and property, and between a state and its sovereign, had not then been wholly got rid of. Hence many rules of property law, which of course were sought in that of Rome, were taken over as international rules

applicable to territory. Secondly, it was in the age when international law was being formed that a theory, by no means confined to that age, attained its fullest development and currency. I mean the theory of a state of nature in which men once lived or might be supposed to have lived, for it is difficult to say how far it was believed in as an historical truth, and of a natural law or law of nature proper to that state. The term so used bore a sense quite different from that of the laws of nature in modern science, which we have already considered, for the conception was a jural one, however ill founded. The theory went on to represent nations as individuals who, from their not having any common political superior, were in the same mutual relations as men in the state of nature, and who were consequently bound by this natural law. But the Roman jurists had also speculated on the same natural law, and had identified with it much of what was their own law as embodied by Justinian in its final shape. And thus a door was opened for the introduction into international law, under the name of the law of nature, of no small part of the private law of Rome on obligation as well as on property.

Austin's limitation of the term "Law."

At this point it becomes necessary to mention that John Austin confined the term "law" to the commands issued by a sovereign authority to persons in general subjection to it, and therefore denied its application to the rules prevailing between states which have no political superior. We shall probably feel less surprise that the revolt against that nomenclature has now become so general than that a writer of such great ability should have adopted it, and that it should have

reigned so long in the legal literature of England. Without laying stress, in a question of definition, on the links which bind international to national law through its dealing with the same topics or borrowing its rules, it seems strange that a distinction can have been missed which transcends political boundaries and runs through every kind of human society, the distinction between rules which the conscience of man allows and often even requires him to enforce, and the claims, commonly called moral ones, which he asserts no such right of making good. It is possible that the distinction was not missed, but that its importance was underrated in consequence of some view about the source of the conscientious obligation which may rest on man to obey a rule. Undoubtedly the question about the authority of law may be asked in that sense, and it may not receive exactly the same answer in the case of international as in that of national law. Since a loosely organised society can give less protection than a highly organised one, and its rules are not ascertainable with equal precision, it may have less claim to the obedience of its members. But the obligation of law on the conscience is a question of ethical philosophy different from that of the objective existence of law in a society, and lying deeper. No one will contend that the obligation to obey the law of the land is absolute. There have been both Christian martyrs and political martyrs whose resistance to it was praiseworthy. But that circumstance does not affect the classification of institutions or facts, and it is with law as an institution or a fact that the legal student has to deal. Finding that in all societies the right to enforce rules is asserted and exercised, for his purpose *securus judicat orbis terrarum*, and he need not hesitate to give the name of

international law to the rules of a society as necessary to human existence as the state itself.

The only alternative to doing so would be to describe those rules as international morality. But that terminology would obscure the fact that the rules in question do not exhaust the ethical duties of states, that in the forum of conscience rules which it is proper for his fellow man to enforce can no more measure the whole duty of man when he is aggregated into nations than when he acts as a private person in his own country, and that this is recognised in the intercourse of states by their from time to time advancing claims which they do not feel justified in supporting with the last degree of pressure, though the growth of opinion sometimes ripens them at a later date into legal ones. Austin indeed, proposing the term "positive international morality" as the substitute for "international law," recognised by the word "positive" some distinction among the mutual claims of states, though not connecting it clearly, if at all, with the general conviction and exercise of the right of enforcement. But unless it be recognised that the distinction rests on that basis there is danger on the one hand of checking the progress of mankind by depreciating the less ripened claims, and on the other hand of putting claims founded only in sectional or individual interests on a par with those which express the general needs of the international society. The late Professor Mountague Bernard drew attention to the latter of these dangers when he said that "the fallacy suggested by the phrase 'international morality' is a more practically mischievous one than the fallacy suggested by the phrase 'international law,' because the temptation to overstrain legal analogies and clothe mere opinions indis-

criminately in the robe of law is less dangerous than the contrary tendency to degrade fixed rules into mere opinions[1]." It is submitted that both fallacies may be avoided if we decline to treat the law of the land as the only proper kind of jural law, for then, while keeping law distinct from morality, we shall not encourage an undue attribution to international law of the characters only appropriate to the law of the land.

In the abstract science of geometry the groups, from the highest to the lowest, are equally real or equally unreal. The rectilinear figure, the triangle and the isosceles triangle are equally unreal in the sense that no objects occur possessing those exact forms, and equally real in the sense that their contemplation by the sentient mind is inevitable. Each therefore is defined in the same way, by enumerating the characters contemplated in it. But natural history deals only with external facts, and wherever these furnish for the determination of genera only such a balance of resemblances as leaves it disputable to what genus a certain species shall be referred, no good end is served by trying to establish the genus on an enumeration of arbitrary characters. Jural law, as a product of human action, is the subject of a natural science. The law that any state has jurisdiction over a pirate, and the law which punishes a murderer with death or imprisonment, are individuals. They fall at once, as natural individuals do, into their natural species, international and national law respectively. Between these species it is submitted that enough resemblance exists to justify comprising them in one genus by the common name of law. But to preclude the enquiry into resemblance by laying down *a priori*

[1] *Four Lectures on Subjects connected with Diplomacy*, p. 171.

that law must be the command of a political superior is to import into a natural science the mode of defining proper to an abstract one.

The Moral Law.

Besides the jural laws which we have been considering, and the laws of nature in the sense of modern science at which we have glanced, "the moral law" is a term often used to express the obligations which are incumbent on men in the forum of conscience. As rules for human conduct, perpetually violated, those obligations can have no connection but that of metaphor with the laws of nature in the sense of modern science, but they have so much analogy with jural laws that the question arises whether they do not form with these last a real class of the highest or most comprehensive kind, to the whole of which the term "law" is applied with an identical meaning. In order to answer that question in the affirmative the notion of human enforcement, which accompanies all jural laws and makes by its presence the very distinction between them and rules of only moral obligation, would have to be excluded from the meaning of law in the largest extension which it can receive without going into metaphor. But the notion of enforcement by superior determination might remain, since in an enlightened conscience the test of a duty is its consonance with a moral order not to be violated without evil consequences, and such a moral order, with the consequential penalties for its breach, may be reverently regarded as imposed by a superior power. Here at last, not by arbitrary definition but by following the train of observable resemblances, we arrive at the final meaning of law.

Rights and Wrongs.

Along with law there goes the notion of a right, that is, of a claim against the person who has violated the law to our disadvantage; and he is said to have done us a wrong, which our right serves to redress. The right and the wrong are jural or moral ones according as the law which has been violated is a jural or a moral one, but in popular language a jural right is called a legal one, so that that language is guilty of the inconsistency of opposing a legal right to a moral one at the same time that it recognises a moral law.

There is no chronological order of priority between society, law, and rights and wrongs. They must have arisen together in the earliest times. No human society can have existed a day without its law, and the breach of no law can be unaccompanied by the feelings of a wrong and a right. The maxim *ubi societas ibi jus est* must have been as true always as now, and in every age its truth is equal in both senses of *jus*: "where there is a society there is law" and "where there is a society there are rights." But the logical order is that which we have followed. Rights and wrongs presuppose laws, and laws presuppose society. Even the moral law is not adapted to man in isolation.

CHAPTER II.

THEORY BEARING ON INTERNATIONAL LAW DOWN TO THE RENAISSANCE.

Greece.

IT is in the literature of Rome that we meet with the first serious reflection on international relations. Active as was the Greek mind in most directions it never busied itself with law, and when the law of a city received little attention except as a branch of politics it could not be expected that the law which was possible between cities should be made a subject of philosophical treatment. The Amphictyonic oath imposed the obligation not to destroy a city of the league or cut off its water supply, and among "the lawful customs of the Hellenes," "the observances to which Hellenes have a mutual claim[1]," we find mentioned the prohibition of poisoned arrows, the duty of releasing prisoners of war for ransom, and that of offering to submit disputes to arbitration before resorting to war. How small was the practical influence of these oaths and maxims the reader of Thucydides knows from the sad stories of Platæa and Melos, but at their best they aimed at little more than mitigating or preventing the horrors of war, they scarcely disclose any recognition of a justice which

[1] *τὰ τῶν Ἑλλήνων νόμιμα, τὰ πρὸς τοὺς Ἕλληνας δίκαια.*

should govern all international relations, their root seems to have been feeling and not reason. Therefore they were not observed, and even the feeling stopped at the limits of Greece. "With other races, with barbarians, all Greeks are eternally at war," said the Macedonian envoys at the Ætolian council[1].

Rome: Jus Gentium.

To teach law to the world was the especial mission of the Romans. Accordingly they believed that peace and not war was the normal relation between them and other nations, and that in their conduct towards other nations there was a path of justice to be followed. They had a college of *feciales*, whose duty it was to see that at least the formal requisites of fair and hallowed dealing with foreign sovereigns and communities were observed, and one of whom solemnly claimed redress as a preliminary to a declaration of war on its refusal. And it is from the Roman lawyers that the world inherits the name and the conception of *jus gentium*, the original import of which must be explained before we can venture to translate it by the modern phrase, "the law of nations."

"If any one," says Pomponius, "assaults an ambassador of the enemy, it is considered to be a breach of the *jus gentium* because ambassadors are held to be sacred. And therefore, in a case where ambassadors were at Rome at the time when war was declared against their nation, it was determined that they remained free in accordance with the *jus gentium*[2]." But for their character as ambassadors they might have

[1] Cum alienigenis, cum barbaris, æternum omnibus Græcis bellum est: Livy, xxxi, 29.

[2] Pomponius, lib. xxxvii ad Quintum Mucium, in Dig. 50, 7, 17.

been enslaved as enemies. Disregard however this trait of barbarism, and the ideas of Pomponius are quite those we are accustomed to in the modern world. He recognises the sanctity of diplomatic intercourse, which is clearly a matter of public law between states, and he refers it to the *jus gentium*. Why should we hesitate to translate that phrase by "the law of nations"? One reason is that, with us, "the law of nations" has come to mean exclusively the law prevailing between states, or international law, while the Roman jurists included more in their *jus gentium*. Another reason is that, to many modern minds, "the law of nations" is a law which rests on the consent of nations or states as such, while the Roman jurists regarded their *jus gentium* as resting on the consent of mankind, of the whole body of men as thinking and feeling individuals distributed among the nations. Let us see how this results from the employment of the phrase on other occasions.

The courts of law at Rome had to determine litigation between foreigners, of whom the influx was large, and between foreigners and Romans. They could not apply the law of their own city for that purpose, because the law of a city was regarded in the ancient world as the peculiar inheritance of its citizens, not lightly to be communicated to others, and because it would not have been just to apply the law of Rome to transactions which must often have been entered into without reference to it. Such a state of things must also have arisen at Athens or at any other great political and commercial centre, but the Roman genius for law could not bear to meet it unsystematically by trying to do the best in each case as it arose. It demanded rules, and they were reached through the display of another Roman tendency, that of resorting

to observation rather than to reasoning *a priori*. It was noticed that in every institution, such as marriage or contract, there was a kernel of substantial importance in which the laws of all nations agreed, and a husk of forms in which they differed. Accordingly, where Roman law could not be applied, the husk was stripped off and the kernel was deemed to be sufficient. Thus a Roman stipulation had to be made by the words *dari spondes? spondeo;* "do you undertake that such or such a thing shall be given?" "I undertake." But the *prætor peregrinus*, the judge whose business it was to administer justice where foreigners were concerned, held that by or with them a contract had been sufficiently entered into by the words *dabis? dabo;* "will you give?" "I will give"; or by any other words that expressed the intention of incurring an obligation[1]. In doing this he was said to administer the *jus gentium*, but the law which he applied was not one existing between nations or indeed any public law, nor as private law was the bare kernel which he applied the law of any nation, nor did it derive its force from the consent of any nation as such, except of course such consent of Rome as was involved in its application by a Roman official. It was a law embodying the elements which were proved, by comparing the laws of different nations, to have the approval of men to whatever nations they belonged. Hence the classical jurists give, as equivalents for *jus gentium*, "the common law of all men" (*commune omnium hominum jus*), "that which is equally observed among all peoples" (*id quod apud omnes populos peræque custoditur*), "the law which all nations use" (*jus gentium, quasi quo jure omnes gentes utuntur*)[2]. And in all these expressions

[1] Gaius, 3, 93. [2] Gaius, 1, 1; Just. Inst. 1, 2, 1.

we shall more accurately seize the sense of the original if we remember that *jus* included the principles of legal right as well as the rules of law, although, as the English language possesses no one word comprising both, the translation must necessarily be inadequate.

Having thus arrived at the true meaning of *jus gentium* so far as concerns private law, we perceive that its meaning in public law was the same. When Pomponius relates the determination (*responsum*) that ambassadors were sacred by the *jus gentium*, he means, and the authority which he quotes meant, that they were sacred by the universally recognised principles of legal right. They were sacred because, in matters concerning nations as well as in those concerning private persons, principles which commended themselves to the conscience of all men were to be observed. The principles were plain enough in the particular instance. Ambassadors are necessary to intercourse between nations, and they had entered Rome in reliance on the public faith. But what put the stamp on those principles was the universality of their recognition by reflecting beings. This it was that made ambassadors sacred by the *jus gentium*. No special department of law in force between nations was appealed to, nor was the consent of any nation as such implied. If Pomponius had been told that some strange people claimed to enslave Roman ambassadors, or objected to the Roman prætor's holding its members bound by stipulations not couched in a prescribed form of words, he would doubtless have replied in each case that the general judgment of mankind was to be followed, and would have felt in each case that his reply rested on the same basis.

Rome: Jus Naturale.

The Roman appeal to the general judgment of men, founded on observation of their wide agreement, was reinforced by Greek philosophy. The Stoics, whose system was the most accepted at Rome, taught that nature recommended certain principles of conduct, and of justice as a part of conduct. Principles so recommended were necessarily independent of state boundaries, and harmonised in their liberality with those which analytical observation detected as underlying the variety of state laws. The classical jurists therefore readily identified the natural law which the Stoic philosophy suggested—*jus naturale*, the jural as distinguished from the scientific laws of nature—with the *jus gentium*, which in the spirit of that identification came to be applied between Roman citizens as well as where foreigners were concerned. Gaius uses the former term as equivalent to the latter when he contrasts delivery, as a mode of transferring property *naturali jure*, with mancipation and other modes of transfer existing by the peculiar law of Roman citizens, *jus proprium civium Romanorum;* and he declares in general terms that the *jus gentium* is "what natural reason establishes among all men," a declaration which Justinian adopted from him[1]. One jurist however of the great age, Ulpian, noticing that some legal institutions are based on natural facts common to men with other animals, carried his love of subtlety so far as to found on that circumstance a distinction between *jus naturale* and *jus gentium*. He defined the former as "that which nature has taught all animals, and from which come the union of male and female, called by us marriage, and the

[1] Gaius, 2, 65; 1, 1. Just. Inst. 1, 2, 1.

procreation and education of children[1]." In an age less philosophical even than that of Ulpian Justinian adopted this definition along with what he took from Gaius, but it must be condemned. It favours the notion that statements of fact about natural habits, which so far as they are true are laws of nature in the scientific sense, can be directly transmuted into jural or moral laws, without considering whether the habits in question need encouragement or check. Or if it be admitted that the legal institutions based on natural facts must be moulded by other considerations besides that of the bare facts, still it is irrelevant to those other considerations whether the basal facts are common to all animals or peculiar to man. So far as it is permissible to speak of a law of nature in a jural or moral sense, it can only be understood to comprise those precepts which, all things considered, reason establishes. And the classical Roman tradition must be followed in holding that where and so long as there is a general concurrence of civilised men in favour of certain precepts as established by reason, there and so long such precepts must be accepted for practical purposes as those of natural reason, without prejudice to the efforts of reformers to bring the world over to a different opinion, as they have often done.

The dissolution of the Roman empire: Isidore of Seville.

But in consequence of the refusal of Ulpian and Justinian to treat *jus naturale* and *jus gentium* as equivalent, or to distinguish them as reason propounded by philosophers and reason accepted by the world, they

[1] *Jus naturale est quod natura omnia animalia docuit.....hinc descendit maris atque feminæ conjugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio:* Just. Inst. 1, 2.

came to be treated during a long course of ages as separate departments of law. Perhaps no one again laid much stress on the difference between fundamental facts as being common to all animals or peculiar to man, but other lines of demarcation were found. Isidore of Seville, writing early in the seventh century of the Christian era, reserves the term *jus gentium* for what we should now describe as international law, so that here for the first time we find that term fairly translatable by "law of nations[1]." All the remaining matter of the old *jus gentium*, namely the law common to all nations, *jus commune omnium nationum*, he includes in *jus naturale*. When Isidore wrote independent kingdoms had been founded by the northern races within the ancient limits of the Roman empire, and it was doubtless owing to that circumstance that the rules prevailing between states acquired importance enough to be treated as a separate branch of legal science with a name of its own. This rapid development of the scientific classification in accordance with the political changes suggests the true cause why in a more enlightened age, and with such excellent principles to start from, the Roman jurists never worked out a system of international law. It is that in their time there was hardly an international society. The Roman and Parthian empires divided the world within which international relations on any thing like an equal footing

[1] Isidore also has a *jus militare*, among the subjects of which he mentions *belli inferendi solemnitas* and *fœderis faciendi nexus*. But by this seems to be intended only as much as a military commander need know about those subjects, for *bella*, *fœdera* and *paces* are enumerated by him among the subjects of *jus gentium*. Etymologiarum libri xx, l. 5, c. 4 to 7; quoted by Nys, *Le Droit de la Guerre et les Précurseurs de Grotius*, p. 12. Isidore died in 636, and is said to have been engaged on the Etymologia at the time of his death.

were possible. But the society which is to give birth to law must contain a sufficient number of members for the questions which arise among them to be viewed in a general light. Between two or three individuals particular interests determine and general rules do not arise. For the rest, the earliest enumeration of the subjects of the law of nations is interesting enough to be quoted, though not of any scientific importance. *Jus gentium*, Isidore says, "is the occupation of territory, the building and fortification of cities and castles, wars, captivities, enslavements, the recovery of rights by postliminy, treaties of peace and others, truces, the scruple which protects ambassadors from violence, prohibitions of marriage between persons of different nationality[1]." The first and the last items in the list vividly reflect the land-hunger of the northern invaders, and the jealous separations which they had substituted for the unity of the Roman peace.

The Renaissance: Suarez.

The definitions of Isidore of Seville were copied in the Decretal of Gratian and generally followed during the middle ages[2], but the Renaissance writers, returning to classical authority, restored to *jus gentium* a larger meaning than international law, though they did not in general reassert its equivalence to the *jus naturale*. On the one hand the enlightenment of the conscience by Christianity, on the other hand the experience of centuries of practical barbarism, had made it evident to the best thinkers that general consent tolerated and

[1] *Jus gentium est sedium occupatio, ædificatio, munitio, bella, captivitates, servitutes, postliminia, fœdera, paces, induciæ, legatorum non violandorum religio, connubia inter alienigenas prohibita.* Isidore of Seville, u. s.

[2] Nys, u. s., p. 13.

even approved of much which could not be fairly charged on nature in any sense in which that term implied reason. Hence *jus naturale* and *jus gentium* came to be currently distinguished, the former as those rules whether of public or of private law of which the necessity could be seen, the latter as those rules whether of public or of private law of which the necessity could not be seen, and which were to some extent though by no means altogether reprehensible. This classification, in its bearing on the mutual relations of states, is admirably given in a passage of Suarez which it is well worth while to quote at length.

"The human race, however divided into various peoples and kingdoms, has always not only its unity as a species but also a certain moral and quasi-political unity, pointed out by the natural precept of mutual love and pity which extends to all, even to foreigners of any nation. Wherefore although every perfect state, whether a republic or a kingdom, is in itself a perfect community composed of its own members, still each such state, viewed in relation to the human race, is in some measure a member of that universal unity. For those communities are never singly so self-sufficing but that they stand in need of some mutual aid society and communion, sometimes for the improvement of their condition and their greater commodity, but sometimes also for their moral necessity and need, as appears by experience. For that reason they are in need of some law by which they may be directed and rightly ordered in that kind of communion and society. And although this is to a great extent supplied by natural reason, yet it is not so supplied sufficiently and immediately for all purposes, and therefore it has been possible for particular laws to be introduced by the practice (*usu*)

of those same nations. For just as custom (*consuetudo*) introduces law in a state or province, so it was possible for laws to be introduced in the whole human race by the habitual conduct (*moribus*) of nations. And that all the more because the points which belong to this law are few and approach very nearly to natural law, and being easily deduced from it are useful and agreeable to nature, so that although this law cannot be plainly deduced as being altogether necessary in itself to laudable conduct (*ad honestatem morum*), still it is very suitable to nature and such as all may accept for its own sake[1]."

In this passage Suarez, dealing with the rightful foundation of international law, does not notice the fact, to which he was certainly not blind, that custom had introduced bad rules as well as good ones. Also his reference to the human race as the source of binding international custom is too large, for no international society has ever been of that extent, even if we suppose only the civilised part of mankind to be intended. This was not long afterwards pointed out by Grotius who, after describing *jus gentium* as that law which has received its obligatory force from the will of all or of many nations, proceeds—"I have added 'many' because scarcely any law except the natural law, which itself is often called *jus gentium*, is found to be common to all nations[2]." Already Ayala had spoken of "laudable and ancient customs" as having "been introduced between Christians[3]." But Suarez has put on record

[1] Tractatus de Legibus et Deo Legislatore, 2, 19, 9; quoted by Nys, u. s., p. 11. This treatise passed the censure in 1611 and was published at Coimbra in 1612.

[2] *De Jure Belli ac Pacis;* 1, 1, 14.

[3] *De Jure et Officiis Bellicis et Disciplina Militari libri tres;* l. 1, c. 5, no. 19.

with a master's hand the existence of a necessary human society transcending the boundaries of states, the indispensableness of rules for that society, the insufficiency of reason to provide with demonstrative force all the rules required, and the right of human society to supply the deficiency by custom enforced as law, such custom being suitable to nature.

A complete theory of international law, as of every other subject of human activity, must include both a statical and a dynamical branch, a branch dealing with the subject in a state of equilibrium and one dealing with it in a state of movement or progress. When reason and custom were recognised as the two sources of international law, the statical branch of that science had been placed on the footing on which alone it can stand. At the same time, since reason is fallible and customs change, the dynamical branch existed in germ. But the men of the Renaissance scarcely perceived this, because the boundless intellectual confidence of that spring time led them to regard the dictates of natural law as capable of clear and exhaustive enumeration, and because the material conditions on which custom so largely depends had been little altered during many ages. We however have learnt that the term "natural law," as then employed, was little more than the expression of a sentiment so strong that for the time it seemed to be a pledge of its own perpetuity. The possibility of change in the law of nations has been proved by experience. Many of its rules are now quite different from what they were two or three centuries ago. That the international society possesses no legislature, no organisation for declaring a change, puts great obstacles in the way of making and ascertaining one, and that difficulty is

increased by the complicated interests which attend a high state of civilisation. But mere difficulty cannot stop a natural process, and the development of the social relations of man is a natural process. Every international rule was in its establishment a change, if not from a preceding rule at least from the absence of rule, and the causes which established international rules and justified them are in eternal operation.

CHAPTER III.

AYALA: GENTILIS: GROTIUS.

Ayala.

THE end of the sixteenth and the beginning of the seventeenth centuries saw the appearance of three works on the laws of war: Balthazar Ayala's *De Jure et Officiis Bellicis et Disciplina Militari libri tres*, the *De Jure Belli libri tres* of Albericus Gentilis, and the famous *De Jure Belli ac Pacis* of Hugo Grotius. It is not surprising that the part relating to war should have been made a distinct branch of study before any other part of international law. Even now war is by far the most striking fact in international relations, though the whole tenour of those relations has settled us in a point of view from which war seems natural. States, and not any sovereign or other persons, stand prominently out as the parties to international discussions. Those discussions generally relate to topics and are carried on by means of arguments very different from the topics which occur and the arguments which are used in private matters, and we are prepared to see them decided by methods unknown in private litigation, and in which the respective forces of the parties have free play. But as long as the feudal system prevailed, with its confusion between the notions of

property and government, very many of the disputes which we should now call international were disputes between rulers or cities standing towards one another in the personal relation of lord and vassal or having the personal relation of vassals to a common lord, and claiming territory by virtue of the same rules of law by virtue of which smaller persons claimed a piece of ground before a judge. Vague notions of a supremacy in the pope, or even in the emperor beyond the acknowledged limits of the Holy Roman Empire, on which last however too much stress must not be laid, also tended, so far as they had any influence, to keep the quarrels of rulers and cities on a level with those of private individuals; and the arguments used in them, where feudal principles were not concerned, were mostly derived from Roman private law, rather because there had been little reflection on the difference of the cases than from the recognition of any bond of connection between them as different. On the whole, when we read the international controversies of the middle ages and the time of the Renaissance, we are struck by the fact that the disputants move in a sphere of private law, not as extending that sphere by analogy, but because they do not perceive that their matter carries them into a higher sphere. When such a controversy ended in war, and in war carried on with a savagery but little limited either in theory or in practice, the conclusion was felt to be more disparate from the premises than it is now easy to understand. A transition was suddenly made from a region of law less open to question than much of international law would now be asserted to be, to a mode of decision unknown to that region of law and stained by inhuman license. Naturally therefore the first topic of international law

which forced itself on the attention of thinkers was what rational account could be given of war, how it might be distinguished from the unlicensed violence of private persons towards one another, whether any principles of right could flourish on such a soil, to what extent principles of right, if applicable at all, might curb the passions which war seemed to let loose.

The first attempt to give a complete answer to these questions was made by Ayala, whose work was published at Douai in 1582. It was dedicated from the camp before Tournay, 31st October, 1581, to the prince of Parma, in whose army the author was *supremus juridicus*, judge advocate. The three books into which it is divided have no separate titles, but correspond to the three parts of the general title, *de jure bellico, de officiis bellicis*, and *de disciplina militari*. In the preface Ayala declares his intention of combating the common opinion that war is incompatible with law, and that to seek to reduce its practice to a rule of justice is as though we should seek reason in madness. He must be given great credit for this design, though he pursues it without much philosophy or method. He adopts the common view of his time, that of a natural law to which the *jus gentium* was added by general consent; but he fluctuates within a few lines, and without perceiving that it is a fluctuation, between asserting on the one hand that all men enjoyed liberty by the natural law and that the *jus gentium* has abolished that enjoyment by introducing slavery, and on the other hand that the *jus gentium* is consistent with the natural law because the latter had not prohibited slavery but only not established it[1]. We need not follow him into detail. The most important point

[1] L. 1, c. 5, no. 16.

to remark is that while making the legal effects of war depend on its being *justum bellum*, he disconnects the epithet from the justice of the cause and makes it depend on the war being carried on by princes having no superior, so that it may be *justum bellum* on both sides in the sense of possessing *plenitudinem quandam*, a certain satisfaction of legal requisites, as in the phrases *justæ nuptiæ*, *justa ætas* and others. It is clear that, since the justice of a war is necessarily in dispute, no laws of war could be established on any other basis than this; but Ayala puts it on the ground that it is not fitting, *non convenit*, to discuss the equity of what is done by princes who have no superior[1].

Gentilis.

Albericus Gentilis, a native of San Ginesio in the March of Ancona and a doctor in the civil law of the university of Perugia, left Italy in consequence of his having adopted Protestant doctrines, and in 1588, the year of the Spanish Armada, was Regius professor of the civil law at Oxford. Already, in 1585, he had published a book *De Legationibus*. In a letter which Professor Holland has printed in the preface to his excellent edition of the *De Jure Belli libri tres* (1877) we find Gentilis inviting a friend to the Oxford Commencement of July 1588, when he was to discourse "on the laws of war, the causes of making it, the mode of carrying it on, and the rights of conquerors and conquered"; and disputations were to be held under his presidency on the questions

"Whether a war can be just on both sides; whether the laws of diplomatic intercourse apply to civil wars; and whether a subject who differs in religion from his prince ought to bear arms against a prince of

[1] L. 1, c. 2, nos. 33—35.

his own religion—that is," as Gentilis adds, "whether a papist is right in serving his prince in arms against the pope."

A *De Jure Belli commentatio prima*, published about October of the same year, and a second and third published in 1589, doubtless gave to the world the matter which had been thus propounded at Oxford; and the *De Jure Belli libri tres*, in which these treatises are enlarged Professor Holland says to five times their extent, appeared in 1598. But the list of subjects contained in the letter of ten years before expresses with considerable accuracy the scope of the book even in its final shape. The opportuneness of those subjects to England threatened by the Armada, when the conduct that would be pursued by the English Catholics was so important a question, is obvious. We cannot doubt that it was because of such opportuneness that Gentilis rushed into print without giving himself the time to work out his subject with the fulness he afterwards gave it, but the turn of his mind must bear the responsibility for the fact that, even in 1598, his first chapter presents his principles in a manner which I once summed up as follows, and I think without parody.

"The proper foundation to build on is natural reason, the consent of all nations (the terms are treated as convertible). *All* nations? Well, no; that is the way Donellus presses definitions, but do not let him mislead you, for the consequence is that he has to give the definitions up. And the Roman lawyers did know nearly all the world, and the unknown must be judged of by the known. Besides, if all do not agree, the major part must govern, just as with individuals in a state (remember that Gentilis came from an Italian city). And then, too, natural reason is plain in itself. It is enough to say, 'Nature teaches us,' for you know there are things that are only made darker by trying to prove them. We shall quote great authors, as in other arts and sciences, and the doings of great and good men, and Roman law, and the Bible. Go to the mathematicians for proofs: the nature of my subject only admits of persuasion. 'Come then; there is no lack of matter to ground our decisions upon, so let us begin[1].'"

[1] The Academy, 5th January, 1878, p. 2.

Indeed the superiority of Gentilis to his predecessor lies in the completeness with which he ultimately worked out his subject, and in his conception of its unity and limits, free from the connection with tactics and military administration in which Ayala had presented it. His inferiority in principles is strikingly illustrated by his mode of dealing with the question whether a war can be *justum bellum* on both sides, so as to produce its legal effects on both sides, as in changing the property of things captured. He misses the true solution given by Ayala, and labours to reconcile the correct answer, which he cannot help seeing to be necessary, with the assumption that legal effects can only flow from the justice of the cause, and that this is implied in the phrase *justum bellum*. For that purpose he urges that there is generally a show of justice on each side; that the mean in which virtue consists is not a point but a space possessing breadth, within which room may be found for each, though the one is more just than the other; that a man may try his chance if the case is obscure, and that "when utility conflicts with honour there is no little obscurity which we ought to follow"; lastly, that it will not often happen that the injustice of one side is evident, and that laws are not to be framed to suit exceptional cases[1]. And this he finds satisfactory.

Nor was Gentilis a man from whom any assistance could be hoped in mitigating the ferocity of war. Liviano, he says, put a prisoner to death with insult, because he had been accustomed to call him a beast; and Liviano was right. It has been very common, he says, to hang persons who try to introduce supplies into besieged towns; and rightly, if they are mercenary merchants, because they are not helping their country

[1] L. 1, c. 6.

but have been led by greed so far as to despise a power stronger than themselves. Apparently neutral merchants are intended by mercenaries. Again, Gentilis agrees that it seems very hard to kill hostages for other men's faults, but he holds it to be both just and expedient. Bodin says that the practice of killing hostages was given up because bad faith is now so common that it would have to be too often done; but I, Albericus, say that faith has ceased to be kept since its breach has ceased to be punished[1].

Grotius.

Hugo Grotius was born at Delft, in Holland, in 1583. He took an active part in the political and religious dissensions of the United Provinces, was imprisoned on the defeat of the Arminian and republican party, to which he belonged, escaped by the aid of his wife, and took refuge in France. There he wrote the *De Jure Belli ac Pacis*, which appeared in 1625, dedicated to Lewis XIII. By negotiating the alliance between France and Sweden, which decisively turned the fortune of the Thirty Years' War against the emperor and the Catholic cause, he contributed to the foundation of the new Europe which was consecrated by the Peace of Westphalia; but he died in 1645, three years before that peace was concluded.

The *Nouvelle Biographie Générale* mentions forty-eight different publications of Grotius, besides his letters. All are in Latin except "Proofs of the true religion," in Dutch verse, intended to show sailors how to convert pagans, and an introduction in Dutch

[1] The first two passages are in l. 2, c. 18, and the third in l. 2, c. 19: pages 220, 227, 233 of Professor Holland's edition.

to Dutch law. He begins in boyhood as a poet, soon writes sacred dramas, and continues to compose verses and dramas all his life. He translates modern mathematics and philology and Greek astronomy, the history of Procopius, the Greek anthology and the Phœnissæ of Euripides. He edits Lucan and Tacitus. He writes on the antiquities of the American Indians and of the institutions of Holland; the history of the Dutch republic; on law, Roman and modern Dutch. He annotates the Old and New Testaments, and pours out a flood of political and theological writings, being greatly occupied late in his life with a scheme for the reconciliation of the Protestant and Catholic Churches, as he had been earlier with the evidences of Christianity and the controversy against the Socinians. Nor is this enumeration exhaustive, but only one of his works appears to have been philosophical, and that not original but a compilation: *Philosophorum sententiæ de fato*, published posthumously in 1648. If international law could even otherwise have been overlooked by a writer with such varied interests, it was forced on his attention by the hostilities in the straits of Malacca between the Dutch East India Company and the Portuguese, and by the scruples of conscience which led the Mennonites and others in Holland to refuse their share of the booty. Grotius, then only in his twenty-second year, vindicated the Company and its right to the booty in a treatise *De Jure Prædæ*, which contains the germ of his great work, but was never printed in full till 1868. Four years indeed after its composition, when Spain was proposing to Holland terms which included the abandonment by the republic of the commerce of the Indies, he published the twelfth chapter of the *De*

Jure Prædæ under the title of *Mare Liberum*, in order to animate his countrymen to refuse such an accommodation; and this work became famous at a somewhat later date, when Selden, in order to maintain the sovereignty of England over the narrow seas, published in answer to it the equally famous *Mare Clausum*. But the main thread of his ideas on our subject Grotius only resumed when in exile. He resumed it however so soon after acquiring that enforced leisure, and made such use of his earlier studies, that we cannot doubt his having always borne them in mind, or attach much importance to the statement that the composition of his great work was undertaken at the instance of Peyresc.

To form an idea of such a man and such a life we must imagine a leading statesman of the end of the nineteenth century who in periodical literature, daily monthly and quarterly, should pour forth a stream of contributions on all subjects, and should at the same time write for the stage and be a minor poet. To whatever subject he turned for the moment one of the thousand facets of his mind, we should expect keen remarks and more or less sagacity, but for depth of view on any of them we should look to some one who felt more need of concentration. Yet we should be unjust to Grotius if we took his measure from the comparison suggested. No department of knowledge had in his time been carried so far as to become the property of the specialist, and the future advancement of knowledge was so little foreseen that erudition was valued out of proportion to originality. He possessed a love of truth, and an unwearied industry in seeking it where it was believed that it might be found, which must command our admiration all the

more because those are not the most characteristic qualities of the active politician or the universal writer.

Still less should we be just to Grotius if we forgot the goodness of his heart. The sack of Magdeburg had not taken place when the *De Jure Belli ac Pacis* appeared, but the war which was to be that of Thirty Years had already given signs that in savagery it would not fall behind those of the preceding century, and while the men most advanced in feeling and thought were asking whether some restraining principles might not be found, to no one did the horrors of the time appeal with greater force than to him. He tells us that sorrow and indignation moved him to write[1]. But his mind was too systematic to attack the subject of his primary interest without considering it in a more general light. There is therefore in the book so much both of theory and application not directly relevant to the mitigation of war, as entitles it to be considered the first fairly complete treatise on international law. The theory, as the logical rather than philosophical character of the author's mind dictated, largely takes the form of distinctions with most of which we need not trouble ourselves much, but one is so important that it must be fully explained.

The distinction to which I refer is the very ancient one between expletive and distributive justice, *justitia expletrix* and *justitia attributrix*[2]. Expletive justice redresses wrongs, and the right of the party who invokes it is called in Latin *facultas*. Within a state it is administered by courts of justice. But how does

[1] *De Jure Belli ac Pacis*, Prolegomena, 28; and in his letters Grotius expresses himself to a similar effect.

[2] Ib.; Pr. 9, 10; l. 1, c.1, v—viii. The *expletrix* is Aristotle's δίκη ἐπανορθωτική, the *attributrix* his διανεμητική.

any one come to have something of his own, his enjoyment of which can be interfered with, and he be thereby wronged? It is because law has given him something of his own. But law ought not to be arbitrary. Whether it proceed from a legislature or from a society of men establishing a custom among themselves, and whether that society be a national or an international one, law ought to be guided by distributive justice, which depends on a wise consideration of all the claims existing in the circumstances. The claim which any one has to such an exercise of distributive justice as shall frame the law in his favour is called in Latin *aptitudo*. When the law has been so framed, a legal right or *facultas* arises under it by expletive justice against all who do not respect the claim so recognised. Until then, and within a state, the claim ought not in English to be called a right without the epithet *moral*, to indicate that something is wanting to the power of enforcing it. But outside the state tie, Grotius held that any one might right himself to the extent measured by distributive justice operating as natural law, so that in those circumstances and to that extent the distinction between legal and moral rights disappeared for him. The measure of expletive justice is definite, namely that of the wrong to be redressed. The measure of distributive justice varies with circumstances, and it often happens that an exercise of it overrides the existing legal right, making a new distribution between the parties, which in its turn expletive justice is charged with maintaining. Thus, to take modern examples, a legislature exercises distributive and overrides what before was expletive justice when it enables a tenant to demand a reduction of rent which he could previously obtain only from the free will of

his landlord, when it enables a bankrupt debtor to obtain a discharge from his liabilities or alters the conditions on which he could previously obtain it, and when it restricts the rights of the lord of a manor over a common. It is often the moral duty of a private person to regulate his dealings with others on the principles of distributive justice, as in the cases of landlords creditors and lords of commons. He may go further and act with charity or generosity. But the existence of the moral duty is the ground for legislative interference, where it is not sufficiently performed or cannot well be so without such interference.

I will now pass rapidly over Grotius's other distinctions. An enumeration of them is necessary in order that the reader may form a notion of what a famous book is like. We meet then with two kinds of law, that which enforces expletive justice, called by Grotius *jus æquatorium* because it restores a party to a position equal to that in which he was before he suffered the wrong, and that which dispenses distributive justice or at least is supposed to do so, called by Grotius *jus rectorium* because by conferring legal rights it governs[1]. The latter kind of law may either be that of nature, which at least outside the state tie is sufficient of itself to confer rights, or be imposed by some will (*jus voluntarium*); but when rights have been conferred it is natural law that their violation should be redressed, and so *jus æquatorium* is a branch of natural law. Grotius in his mature judgment very properly declines to consider any part of the latter as being common to man and animals, though in his youth he had given in to that view[2], but *jus voluntarium* falls into divine and

[1] *De Jure Belli ac Pacis*, l. 1, c. 1, iii.

[2] Compare *De Jure Belli ac Pacis*, l. 1, c. 1, xi, with *De Jure Prædæ*, p. 50.

human law. Human law is then divided into that of a state (*civile*) and that of nations (*gentium*). In his use of the latter term Grotius so far deviates from the language of the Roman jurists as to exclude all institutions belonging to state law, though common to many states[1]: his *jus gentium* only comprises institutions prevailing between states, but as to these he recognises the will of the society as having the force of obligation, of course within the limits set by reason[2]. This *jus gentium* he again divides into that which is truly and entirely law, and that which only produces a certain effect like that of the primitive law[3]. Of these two species the former is identical in substance with the law of nature, the classification only differing according as nature or the will of a society of states is considered as the source of its authority; the other rests merely on the will of that society, and includes laws good and bad, among others the bad laws of war against which Grotius fights. We have now reached the fifth stage of subdivision, and cannot get further in our distinctions about law. But we can start again, and enumerate those classes of rights (*facultates*) which it is necessary to distinguish in giving a detailed exposition of any body of national law[4], and we can distinguish the permissions in the Mosaic law into full and less than full (*permissio plena* and *minor plena*). Only the full permissions are to be allowed as proof that the thing permitted is not contrary to natural law, but the value of this proof does not seem to be great, for Grotius immediately admits that it is often necessary to refer to

[1] *De Jure Belli ac Pacis*, l. 2, c. 8, i.

[2] Ib., l. 1, c. 1, xiv. [3] Ib., Pr., 41.

[4] Power, property, rights of contract; private and public rights. Ib., l. 1, c. 1, v, vi.

the natural law in order to judge whether a Mosaic permission is full or less than full, because the divine words do not mark the distinction[1].

The upshot of the foregoing, so far as concerns the rightfulness of dealings between states, may be thus simply stated. Certain institutions exist among all men, or at least among all the inhabitants of our international world, and are consonant with reason as applied to the conditions of man's existence in that world. They are examples of distributive justice, even if neither history nor any fair presumption to be made about prehistoric times enables us to refer their beginning to a conscious exercise of such justice. Among these are property, with binding contract as its necessary adjunct, the redress by expletive justice of wrongs done to property and the faith of contracts, and, Grotius added, the moderate punishment of the wrongdoer[2]. All such therefore are parts of natural law. States give effect to these branches of natural law as between their members, and are charged with protecting the natural rights of their members as against outsiders. But where, as between states, there is no power supreme over both parties to a difference, each must and may protect with his own strong hand what he conscientiously believes to be his natural rights, even to the extent of inflicting due punishment on the wrongdoer. The responsibility of such a position is great, but it cannot be avoided unless, abandoning the attempt to distinguish natural law, you incur the still more serious responsibility of accepting customary law in its entirety, just and unjust, humane and barbarous. Deeply feeling his responsibility, Grotius, with an

[1] *De Jure Belli ac Pacis*, l. 1, c. 1, xvii.
[2] Ib., l. 2, c. 20, ii, iii.

erudition and labour rarely equalled, fortified his declarations of natural law by the testimonies of men in all ages and countries, but was obliged to acknowledge the difficulty of distinguishing testimony to what was from testimony to what ought to be. By the side of natural law Grotius placed a principle which, in his elaborate classification, fell under the divine branch of law imposed by some will (*jus voluntarium divinum*). It appears in his book under a great variety of names. Sometimes it is the law of charity, or the love of one's neighbour (*proximi caritas*) "especially as enjoined by the Christian law." The natural rule is that you may do to your enemy whatever is necessary to attain the end of a just war, but this Christian principle forbids you to do more harm to an enemy than in the judgment of prudence is likely to be amply compensated by the good expected[1]. In that form it will be noticed that it approaches nearly to the greatest happiness doctrine of Bentham. Elsewhere it is modesty (*pudor*), or equity and human kindness (*æquitas et bonitas*), restraining us from insisting on the pound of flesh which the law of nature would give us. Again it is the respect due not merely to what is equitable and good (*æquum et bonum*), but to that which is most equitable and best (*ejus quod æquius meliusque est respectus*), or the preference of that which is best among the things allowed by nature[2]. And sometimes what the modifying principle enjoins is said to be a thing which ought to be done on moral grounds (*ex morali ratione faciendum*) as opposed to a debt of justice[3]. By whatever name the principle be desig-

[1] *De Jure Belli ac Pacis*, l. 3; c. 1, iv; c. 11, ii; c. 18, iv.
[2] Ib.; l. 3; c. 10, i; c. 11, xvi; c. 12, viii; c. 14, i.
[3] Ib.; l. 2, c. 22, xvi.

nated, the contrast which Grotius makes between it and the true natural law, the *jus stricte dictum*, is one of the most characteristic points in his teaching. Although strict natural law was not in his view the final measure of duty by which a man ought to regulate his own conduct, it was in his view the measure of the conduct which a man is entitled to require from others. We are bound for ourselves both to pay the debts of justice and to do what morality further demands, yet if others fail us in the former we may do ourselves right, and even wage war for punishment as well as for restitution, but a failure in the latter is no just cause of war[1]. As little, if a state transgresses in war the limits of hostile pressure which natural law taken in combination with Christian charity would impose, does Grotius admit that third parties may properly interfere to enforce the observance of those limits or to avenge their non-observance[2]. If Bentham ever noticed this point in Grotius, it must have surprised him that a principle so near to his own of greatest happiness was allowed so little scope in action.

With these general views Grotius set himself to examine the customary law of war, the current *jus gentium* of war. He found that here and there it might be salutary, as in prohibiting the employment of poison, between which and the sword natural law knew no distinction[3]. Or its greater latitude might be inevitable. For example, natural law allowed you to kill your enemy and capture his property only in a just war, and even then to capture his property only to the amount of the damage for which he was liable, with the addition of a reasonable penalty. But the customary

[1] *De Jure Belli ac Pacis*, l. 2, c. 22, xvi.

[2] Ib.; l. 3, c. 4, iii.

[3] Ib.; l. 3, c. 4, xv.

law of nations, having no means of determining the justice of the war or the amount of the fair damages and penalty, allowed you in all wars to kill your enemy and capture his property without limit[1]. In general however the customary law of war was so savage that the great labour of Grotius was to establish, by the side of each license which it granted, some correction (*temperamentum*) which might reduce it to the measure of the natural law as modified by the principle of love to one's neighbour. How moderate were his hopes in that direction may be seen from the fact that he does not absolutely prohibit sacking cities, or enslaving prisoners in countries where slavery exists, or holding them to ransom where slavery does not exist[2]. He sometimes seems to feel about, as it were, for a milder practice than he enjoins[3]; and doubtless he hoped that Christian principles would one day govern conduct to a degree which he did not venture to anticipate in detail.

When we pass beyond the laws of war to other parts of our subject, we shall find that by Grotius and thenceforward much of Roman law was adopted into the substance of international law, consciously, and as a consequence of the general views entertained. As Justinian had handed the Roman law down, cleared of the forms and fictions of earlier ages, it was largely composed of that *jus gentium* which the jurists had elaborated by a comparison of the laws of different peoples and which they identified with natural law. Here then was ready at hand exactly such an embodiment of general consent—consent, not of states as such,

[1] *De Jure Belli ac Pacis*, l. 3, c. 6, i, ii.

[2] Ib.; l. 3; c. 12, viii; c. 14, i, ix.

[3] See ib.; l. 3, c. 13, iv; where Grotius suggests the poverty of the subject of an enemy state as a consideration to be entertained on the question of taking his property.

but of the enlightened part of mankind—as was looked for to give an attestation to nature. And the vehicle which contained it commanded the highest respect. After its revival in the twelfth century, the close alliance of Roman law with the cause of monarchical power against ancient liberties and privileges had raised much opposition to it. But this had passed away as the political controversies concerned had partly been decided and partly come to be waged on other grounds, and little remained to conflict with the prepossession in its favour which the worship of the Renaissance for antiquity occasioned. The law of Rome was called written reason. Thus what it contained on the mutual relations of private persons, and especially so much of it as the Romans themselves identified with natural law, was applied to the mutual relations of states so far as they had any analogy to those of private persons. Such an analogy was very obvious between the territorial rights of states and the proprietary rights of individual citizens, and thus, among other parts, the Roman law of property passed over almost bodily into the international law of territory. A result was produced coincident with that which would have flowed from the principles soon to be proclaimed by Hobbes and Pufendorff, that "states, when they are once instituted, assume the personal qualities of individual men," and that therefore the law of nature is identical for states and for natural individuals[1]. If Grotius did not fully make that identification, at least he had not rejected the notion of patrimonial governments, and, so far as any government was admitted to be such, the

[1] Hobbes *De Cive*, c. xiv, 4, quoted with approval by Pufendorff *De Jure Naturæ et Gentium*, l. 2, c. 3, § 23.

state over which it existed was merged for legal purposes in the person of its sovereign.

Thus through the labour of Grotius, crowning those of the philosophical theologians with Suarez as their chief and of the philosophical jurists down to Gentilis, a fairly complete body of international law was produced at the moment when the international society for which it was to serve was assuming the form which a little later was consecrated by the Peace of Westphalia. The coincidence was not casual. Then for the first time, through the decay of the Empire and of the coercive power of the Catholic Church, it could be seen that the society would be a purely secular one, and would be composed of such a crowd of practically independent states that only general considerations could be applied to their mutual relations. Then too, as the volume of history was being finally closed on mediæval Europe, the jealousy of Roman law also finally disappeared. I proceed to discuss one point in which the theory of international law, as we find it in Grotius, bears the marks of an age no later, as in others it bears the marks of an age no earlier, than that in which it saw the light.

Since that age great changes have taken place in the substance of international law. Neither the laws of war as between enemies, nor the laws of war as affecting the duties and rights of neutrals, nor several parts of the law for times of peace, are the same now as then. The process of change has uniformly been and could only be the conversion of moral claims into legal rights, taking the distinction between these to be what we find it in Grotius, namely the distinction between claims which the general conscience allows you to enforce and those which it allows you to urge

but not to enforce. Every such change is therefore a phenomenon of the same kind as the existence of the law itself. If with Grotius we speak of distributive justice and natural law, the change is a new application of distributive justice in the international field, corresponding to a new view entertained of natural law. If with modern Germans we speak of the idea of right or of the jural conscience, the change expresses a further development of that idea or conscience, just as the old law was an assertion of them so far as they were at one time developed. Now it certainly seems that Grotius did not contemplate it as a possibility that our view of natural law should be progressively expanded. With the intellectual confidence of the men of the Renaissance to which I have already referred, he seems to have regarded natural law, and therefore the measure of justice between states, as capable of being settled once for all by an exhaustive investigation. It would be unfair to believe that he regarded his own investigation of it as perfect, but his mental attitude may be inferred from his dealing with those corrections, *temperamenta*, of the brutality of war which it is his chief glory to have preached. He could hardly have supposed that any reform of the law of nations would ever press more urgently for adoption than these, and certainly not that any could come with a higher authority than that of Christianity which he claimed for them. Yet he did not plead for their admission as law, and he prohibited third parties from interfering in order to restrain the use of unconscientious methods in exacting a debt of justice. Such a belief in the finality of the international law of his day, and so narrow a view of the mutual interest which should

members of the international society, would ›een possible much later.

amount of regulation which a society requires will be in proportion to the closeness of contact between its members and the complication of their mutual dealings. We have been made familiar with the truth that the growth of society has been a gradual transition from status to contract, but it is no less true that after a certain point contract needs regulation and society passes again under law. An active commerce requires a system of bankruptcy, sanitary laws become more necessary as population becomes more crowded, the pressure of population on the soil has been found to call for legislative interference between landlord and tenant. It is well that our sympathy should be on the side of liberty, that we should be jealous in limiting the restraints on individual action as narrowly as can be at all consistent with the welfare of the society. But the principle that closer intercourse needs more regulation remains true, though it may be abused. And the same principle has forced itself into application between states ever since the great advancement in arts and commerce, and the system established by the Peace of Westphalia under the protection of which they have flourished, has led to such intimate and constant international relations. If we think of the navigation of rivers flowing through different territories, the race for the appropriation of uncivilised regions, the extradition of criminals, the influence which the acts of neutrals may have on the fortune of a war, and many other topics, we shall see that, as population increases and intercourse extends, new causes of international friction arise and the friction from old causes is increased.

The only complete remedy is the improvement of law, and the necessary condition of the improvement of law is that each individual shall not wrap himself in unconcern when a wrong done to another is unredressed or the moral claim of another is brutally ignored.

CHAPTER IV.

THE PEACE OF WESTPHALIA AND PUFENDORFF.

THE empire of Charlemagne broke into fragments amid the fluctuating arrangements of which only France and the Holy Roman Empire attained lasting distinctness, and each of those great sovereignties was further broken up into a group of feudal vassals and privileged cities. These, from the Baltic to the Tiber, continually advanced in the direction of independence, while in France an opposite tendency under the Capetian kings progressively reinvigorated the central authority at their expense. The point of disintegration in Germany and Italy, or of reintegration in France, which had been reached at any moment depended more on practical force than on constitutional doctrine, and any theory of government was additionally confused by the extravagant pretensions of the papacy to temporal power and of the so-called Holy Roman Empire to a vague primacy. Throughout France, the Low Countries, Germany and Northern Italy, power was scarcely to be found during the middle ages without a dispute as to its rightfulness or its measure.

Encircling the vast block of territory over which Charlemagne had reigned, a considerable number of states, mostly kingdoms, enjoyed some degree of

internal cohesion as well as independence. Such were England and Scotland, Portugal and Castile, Naples and Venice, Hungary, Poland and the Scandinavian kingdoms: Navarre and Aragon must be reckoned with them, although Carlovingian sovereignty had extended to the lower Ebro. But these were too widely separated, having regard to the imperfect means of communication, to have, as states, the constant relations necessary for developing a body of rules.

The maritime cities of the Mediterranean belonged partly to the central and partly to the encircling sphere. Even when not fully independent, as Venice, they were so little dependent in fact as to carry on war on their own account, and they were involved in the wars of their more or less nominal sovereigns. The hostilities thus arising took place in the midst of a network of intimate and active commercial relations and jealousies, and these cities consequently reduced the rights of belligerents and neutrals at sea to a system which is recorded as already established in the Consolat del Mar, a code of maritime law drawn up at Barcelona about the fourteenth century. They formed for themselves a real international society, though limited in its scope, with the consequence that within the range of that scope they possessed well understood and enforceable rules. But the example is unique in the middle ages, and while it illustrates the dependence of international law on the existence of certain conditions, it throws a stronger light on the absence at that time in the rest of Europe of any regulated society of independent states.

Before the end of the fifteenth century it had become clear that in any future system of Europe France would take her place as a unified and indepen-

dent state and her feudatories would not be heard of, while the power of the emperor had sunk so low that an opposite result seemed probable for his nominal dominions. But the latter result was thrown back into doubt by the great accessions of strength which the Hapsburgs received from marriage with the heiresses of the Low Countries and Spain, and, when religion was added to the causes of political strife, the influence of the emperors in the Catholic part of Germany was increased by their championship of the church. The forces on the other side were, however, still stronger. The Protestant cause was linked to that of the independence of the princes and cities. France was compelled, by the pressure of the Hapsburgs on her northern eastern and southern frontiers at once, to assist in Germany the cause of her politics and not that of her faith; and the vigour of Sweden, which was exerted on the same side in the later scenes of the contest, was of greater weight than the declining energy of Spain. The struggle could only end in the defeat and practical nullity of the imperial power, and in the recognition of the imperial princes and cities as members of the future European system.

In the meantime the struggle had powerfully assisted in creating a new sentiment of unity among the populations which were to be comprised in that system. During the middle ages a striking tale might be the diversion of the moment, wherever its scene was laid, but a steady interest in European events hardly extended beyond the merchants whose traffic might be affected by distant occurrences, and the higher nobility who acquired cosmopolitan relations by foreign marriages and the intercourse of courts. But during the hundred and thirty years between the commencement

of the Reformation and the Peace of Westphalia the victory of the church would have endangered the Reformation everywhere, and Protestants and Catholics living under any government mostly sympathised with their fellow religionists under any other government. A general mutual interest in the fortunes of states arose, widely extended alliances resulted from it, and men felt with a novel force that a moral tie united them. That feeling was aided by the intimate relationship between the literatures of different countries which sprang from their enjoyment of a common Renaissance, and from the identity of the problems which were occupying the minds of all. It was further aided towards the end of the period by a natural revulsion from the horrors with which war had come to be waged, and the growth of commerce which followed the discovery of America and of the passage round the Cape of Good Hope was not without a similar effect. When the plenipotentiaries at Munster and Osnabruck signed the Peace of Westphalia in 1648 the ground had been well prepared for an international society, such a society had indeed been gradually emerging, and we must now look at the shape in which it was completed and consecrated by their work.

First, no questions that had ever before received a diplomatic settlement had been of such far reaching import, or had been settled with the concurrence of so many powers. The questions concerned all Western Christendom either by their political or by their religious bearings, and the representatives of nearly all Western Christendom were assembled to determine them. The very meeting of such a congress was not only the first affirmation, but by its scale a striking affirmation, of the existence of a body of states which

their various interests, whether agreeing or clashing, did not permit to be strangers to one another. Such a body, the discussions arising between any of which are matters of general interest to all, has ever since existed in our portion of the globe, and its limits have been extended as occasion has arisen. Early in the eighteenth century Russia entered it as a consequence of her increased strength and civilisation, and the necessity arising from her geographical situation led to Turkey being formally admitted to the European system by the treaty of Paris in 1856. It is true that, since 1648 as well as before, two or more of the powers comprised in that system have often altered the map of Europe by settling their differences without others intervening. It is one of the consequences of the absence of international organisation that the right of intervention in the general interest is not held to be accompanied by a corresponding duty, and the system is therefore a very imperfect protection of the weak against the strong. But the right of intervention in the general interest has not been denied, and the proceedings at Vienna in 1814 and 1815, the participation of Sardinia in the Crimean war though not directly concerned, and the congress of Berlin in 1878, are examples of its exercise.

Secondly, the society of states was definitively established in 1648 as a secular one. The Protestant states in Germany were admitted on an equal footing with the Catholic ones, and the claim of the papacy to a supreme temporal authority was already obsolete.

Thirdly, the right of the princes and cities comprised within the Holy Roman Empire to contract diplomatic engagements with each other and with states outside the empire was formally acknowledged,

subject only to the condition that their engagements should not be prejudicial to the empire or the emperor. But the imperial diet was so hampered by its constitution in determining whether such prejudice existed, and so ill provided with the means of enforcing its determinations, that the princes and cities thenceforth acted and were received as unquestioned members of the European society. They became real states in the international sense, and if one of them so acted as to incur the formal hostility of the empire, the practical case was merely that it had an enemy the more, and not a formidable one.

Fourthly, the fact that the princes and cities of the empire were admitted as members of the international society had its influence on the nature and rules of that society, which became a crowd of individual members, many of them petty, instead of being composed of a few powers all more or less considerable. The situation was the extreme opposite of that which had existed when Rome and Parthia confronted one another, and although the discussion of international law from general points of view might have been sufficiently secured with a much smaller number of states, the tendency to base it on abstract principles was promoted by the inclusion of so many for which there could be little safety if grounds of principle were abandoned. To some extent however this tendency was balanced at first by the circumstance that the members of the Holy Roman Empire brought with them into the international society rules which can hardly otherwise be accounted for. Thus, when private war was a general evil within most mediæval monarchies, a vassal who did not oppose the march of another vassal across his fief to attack a third was

not deemed to offend against the latter: the assailant was merely using the public ways of the monarchy. So when private war, put down elsewhere, became in Germany public war, it was not there deemed the duty of a neutral to prevent the passage of belligerent forces across his territory; and that rule, opposed as it was to principle, found its way into international law and long maintained itself in it[1]. In no part of the development of our subject since the Peace of Westphalia has the influence of principle, in combination with the natural interest of weak states, been more visible than in that part which concerns the laws of neutrality.

Fifthly, the recognitions of the independence of the United Netherlands and Switzerland, the former of which had been conceded by Spain a few months before, put the seal on successful insurrection. Modern international society was stamped from its origin with the principle that states alone are regarded in it, not governments or sovereigns for their own sakes. That principle indeed has not reigned without opposition. That it should have been violated in practice is only what must happen from time to time to every principle in so loosely constituted a society as that of nations. But even in the nineteenth century the combination of absolute powers popularly, though not quite correctly, known as the Holy Alliance attempted to base international relations on a contrary principle of legitimacy, which would have justified working them for the benefit of established governments. The attempt however failed, we may hope finally, and we can see that its

[1] Grotius teaches the equal grant of passage to each belligerent when the justice of the war is doubtful between them: *De Jure Belli ac Paci* l. 3, c. 17, § 3.

success would have given rise to widely different kinds of international society and law from those which in the long run have existed ever since 1648.

Sixthly, the practice by which each state is permanently represented at the capitals of other states by resident ambassadors or ministers of inferior rank, previously an exception, dates as a general one from the Peace of Westphalia. That practice is an outward and visible sign of the common interest which is presumed to bind together even the remotest members of the European society, and is a useful means for the interchange of views in due time on all questions that may affect that interest. If the discussion of such questions was left to special embassies, their despatch would often be delayed till passion and accident had greatly increased the difficulty of an amicable settlement, and the states less directly interested would often lose the opportunity of making their sentiments heard.

Such from the international point of view did Western Christendom emerge from the long contest between Protestant and Catholic, between the kings of Spain and the Dutch people, and, although this branch of the contest was not yet finally disposed of, between the house of France and the house of Austria. There was now a society, and the maxim *ubi societas ibi jus est* vindicated itself. International law was born. There was, first, a general conviction that, besides the friendly offices demanded by good neighbourhood or moral perfection, there were duties for the slighting of which a nation might take its redress into its own hands: secondly, there was a general agreement as to where the rules defining those duties were to be looked for: thirdly, the international society was sufficiently intimate and large to justify an injured member in expecting

that his vindication of its rules would meet with some appreciable support, direct or indirect, as the result of the general approval. Of these three points, the combination of which amounted to law, the important one for the lawyer is the second. He can only deal with rules so far as they are ascertainable. Now general opinion at the era which we are considering sought the matter of international rules in two quarters, both of which were equally recognised in the broad philosophy of Suarez and in the painstaking system of Grotius. One was the natural law dictated by reason, about the contents of which the confident spirit of the men of that age did not apprehend much doubt, and which really was much clearer to them than might otherwise be supposed, because it was generally admitted to include that large part of Roman law which the classical jurists had attributed to a natural source. In case of doubt it was to be proved as Grotius had proved it, by testimonies culled from writers and statesmen of all nations, and therefore establishing that kind of consent which the Roman jurists had relied on for the *jus gentium* which they identified with it, a consent of mankind and not of nations as such. The other quarter in which international law was looked for was the *jus gentium* as that term was then commonly used, the rules by which the natural law had been supplemented through the custom of nations as such, provided that the rules of this class were at least not repugnant to natural reason. The authority of reason and of custom so limited appeared to be an unquestionable necessity of human intercourse.

The greatest practical difficulty which attended these views was that, when the custom of nations as such was purged from those remains of savagery which

Grotius had taken the lead in denouncing, there was not much left of it for which a custom could be quoted coextensive, or nearly so, with the society for which rules were needed. Take for instance that important chapter of the laws of maritime war which affects the rights of neutrals. The Mediterranean rules embodied in the Consolat del Mar allowed neutral property to pass free on board enemy's ships, and confiscated enemy's property on board neutral ships. These rules had received no inconsiderable amount of recognition in the Atlantic also. Edward III. of England had adopted them in treaties which he concluded with the seaports of Biscay Castile and Portugal, the Hollanders had acted on them in a war with the Hanse towns in 1438, and they appear in the Black Book of the British admiralty. But the rule of France was *robe d'ennemi confisque robe d'ami:* the enemy's ship infected the neutral goods on board and the enemy's goods infected the neutral ship which carried them, and all were condemned. And the northern powers, strong at sea, did not really allow to neutral commerce the freedom which the Mediterranean cities, more equally matched, were obliged to tolerate. England Denmark Sweden and the Hanse towns laboured to put down neutral commerce with their enemies by treaties, by solicitations to neutral sovereigns, and even by arbitrary prohibitions. The close of the sixteenth and the beginning of the seventeenth centuries were marked by the Dutch invention of blockade and by a greater readiness to limit general prohibitions to articles distinguished as contraband of war, and the doctrines of the Consolat thus began to stand out more clearly, in the practice of the powers which professed them, as applicable to neutral commerce in all cases except those

of blockade and contraband. But they were still confronted by the French rule, and in the middle of the seventeenth century the Dutch, in view of their interest as neutral carriers, made efforts which were widely successful to introduce by treaty the rule "free ships free goods, enemy ships enemy goods." Evidently then there was no custom of nations on the subject.

With this state of things Grotius dealt feebly. He did not mention contraband of war; he subjected blockade to a condition not dreamed of by his countrymen, that a speedy surrender of the blockaded place should be expected; he suggested a baseless presumption that the goods on board an enemy's ship would be enemy's, in order to justify the infection of neutral goods by the enemy character of the ship; and he would have made the infection of a neutral ship by the enemy character of the goods on board depend on whether the shipowner had consented to carry them. Indeed the book of Grotius obtained an instant and wide currency as expressing the milder sentiments of the age which was coming in, and as containing, in spite of all its gaps, the most complete code to be found of the law which was wanted. But it must from the first have been felt to be wanting with regard to the questions for which, because they were those of the day, erudition could do the least. It is not surprising that Pufendorff, the next theorist on international law, entirely eliminated from his sources of it the custom of nations which had given so little of useful result.

The boundary between the natural law and the superadded custom of nations had been difficult to trace in those points of established usage of which the justification by reason was so simple that they might just as well be regarded as necessary deductions from

reason. Pufendorff elected to refer such points to the natural law, and for all the rest he denied that the custom of nations had any binding force on the conscience. Thus Grotius had included the rules relating to diplomatic intercourse (*jus legationum*) in the *jus gentium*, but Pufendorff referred the immunities of ambassadors to the natural law so far as he regarded them as necessary for legitimate purposes, while, so far as they covered the residence of ambassadors more for the purpose of spying than of treating, he held that any state might refuse them if it was ready to have its own ambassadors dealt with in the same way[1]. His point of view was that of the theologian and the moralist and not that of the lawyer. His interest lay rather in determining the limits which conscience might allow to the action of an individual man or state in conceivable circumstances, than in determining the rules which ought to control such action in the main. Hence, while insisting much on the social nature of man as the source of his duties, he missed the essential facts that, if society is to exist, it must establish rules free from such undefinable elements as the principal purpose of an ambassador's residence, and those rules must be acquiesced in by the members of the society. He missed what Suarez, casuist as he too was, had been able to see. But even Pufendorff could hardly have missed it if in his time the custom of nations had furnished a body of rules more adequate to their intercourse and more imposing by its comprehensiveness.

The passage in which Pufendorff sums up his

[1] *De Jure Naturæ et Gentium*, l. 2, c. 3, § 23. This work appeared in 1672 at Lund in Sweden, where Pufendorff was then a professor, but he was a native of Chemnitz in Saxony.

international principles is worth giving in his own words. "Lastly," he says, "we must consider whether there is any peculiar and positive *jus gentium* contrasted with natural law, for the learned are not agreed on the question. Many regard the law of nature and the *jus gentium* as being one and the same, differing only in name. So Hobbes (*De Cive*, c. xiv. 4. 5) divides natural law 'into the natural law of men and the natural law of states commonly called *jus gentium*. The precepts of both,' he adds, 'are the same, but because states when once they have been established put on the characters belonging to the persons of men, the law which we call natural when speaking of the duty of individual men is called *jus gentium* when applied to entire states or nations.' To which opinion we fully subscribe, nor do we deem that there is any other voluntary or positive *jus gentium*, at least with the force of law properly so called, binding nations as proceeding from a superior[1]." Thus Hobbes and Pufendorff discarded from their understanding of the phrase *jus gentium* all reference to the authority on which that law was based, whether the conscience of mankind or the custom of nations, and employed it in the sense of the law existing between nations, as in Isidore of Seville and the Decretal. Among the writers who copied them in identifying it in that sense with the law of nature, "the law of nature and of nations," the title which Pufendorff gave his book, became a standard phrase. Startling results flowed from the absolute parity so asserted between the technical individual formed by the state and the natural man. Thus, since between natural individuals a contract extorted by force is not binding, those for

whom the law of nature and of nations was one and the same could not hold that a treaty of peace was binding between states, if one of the belligerents had so completely gained the upper hand in the war that the other had no choice but to accept the terms proposed. Pufendorff did not shrink from that conclusion. If a state rushes into war without first trying all pacific means of settling the dispute, he considers it to be under a kind of contract to abide by the event. But if it is unjustly attacked, and after having vainly appealed to pacific means is driven to conclude an unfair peace, it may try to repair the injustice done it when opportunity offers[1]. For the rest, Pufendorff contributes nothing to fill the void which his elimination of the customary law of nations tended to leave. He passes without notice those great topics, such as the laws of maritime war, on which the need of positive rules was the greatest want of his time in international law. The identity of the law of nature for private persons and for states could lead to no rules for the guidance of states in situations in which private persons are not and cannot be placed.

[1] U. S., l. 8, c. 8, § 1.

CHAPTER V.

BYNKERSHOEK : WOLFF : VATTEL.

Bynkershoek.

FROM the Peace of Westphalia to the present day the great desideratum of international law has been the union of reason and custom in a satisfactory body of rules, satisfactory in the sense in which alone the term can be applied to arrangements made or accepted by man, as supplying a system capable of being put in practice under actual conditions, and fairly meeting the needs which arise from them, without excluding improvement, or modification to suit changed conditions. That desideratum can never be fully attained till the society of states has been provided with some organisation, but to aid in realising it ought to be the aim of every writer on the subject and of every statesman who is concerned with international affairs. Writers and statesmen however will naturally address themselves to the task with different prepossessions. The former, so far as they are impelled by ideas to write, will magnify the part of reason; the latter will find their way smoothed by adherence to custom. Even writers are grouped by personal or national characteristics into schools leaning more to the one or the other element, and within

the first half of the eighteenth century that difference may already be traced between Cornelius van Bynkershoek, the Dutch lawyer and president of the high council of Holland, and the German professor Christian von Wolff.

The principal work of Bynkershoek on our subject is the *Quæstionum Juris Publici libri duo*, published in 1737. He had previously published a *Dissertatio de Dominio maris*, and *De foro Legatorum tam in causa civili quam criminali liber singularis*. He uses the term *jus gentium* in the sense of the law between states which Hobbes and Pufendorff had stamped on it. To whatever extent later theorists might differ from those authorities by admitting an element of custom into the mutual obligations of states, they did not recur in their language either to the Roman meaning of *jus gentium* as the law in which mankind agrees, or to its meaning in Grotius as a branch of voluntary human law. A term which had implied a certain source or a certain part of international law, having been extended to the whole of it through the view that it had but one source in the law of nature, remained identified with the whole, and any distinction had to be made by other words. Henceforth *jus gentium* and the terms that literally translate it—*le droit des gens*, *das Völkerrecht*, the law of nations—mean simply international law.

Bynkershoek's general views are expressed in the few pages which, under the title *ad lectorem*, he prefixed to the *Quæstiones Juris Publici*. "In the law of nations no human authority can prevail against reason, but where reason is doubtful, as is often the case, that law must be judged of by nearly constant practice (*ex perpetuo fere usu*). But many things were

once a part of the law of nations which are not so now; for example, treaties are not now valid without ratification, though the negotiators who concluded them held full powers from their governments, which formerly was otherwise. And therefore the examples and treaties which I here use I take rather from recent than from older times, desiring that what I write shall be practically useful." The authority of custom is thinly veiled by representing reason as doubtful whenever custom is allowed to prevail over it, or is admitted to have changed. And in the body of the work the veil is scarcely maintained. The right of putting captive enemies to death, for instance, is stoutly maintained by reasoning, but it is immediately admitted that it has become obsolete, and that the right of enslaving captive enemies, which succeeded to it, has become obsolete in its turn [1]. And in speaking of contraband of war Bynkershoek roundly says: "the common law of nations on this matter can only be learnt from reason and custom [2]."

But what Bynkershoek has become most famous for is his use of treaties as evidence of custom. "I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another, and in examples that have occurred in one country or another, rather than from the testimony of any poet or orator, Greek or Roman: verily they are the worst teachers of public law. They serve more to display erudition than to furnish authority. The authority of those who transact affairs in the sight of all men, and who have learnt wisdom from what has happened before, weighs more

[1] *Quæstiones juris publici*, l. 1, c. 3.
[2] U. S., l. 1, c. 10.

with me. They are in the habit of concluding treaties on the footing of the practice of nations. Not that I would pay deference even to their authority without reason, but that, where reason is on the same side, I value them more than a pack of poets and orators[1]." It will be observed that in this declaration of principles, as well as in the previous quotation from the *ad lectorem*, the appeal is made to statesmen and to examples without a limitation to treaties, although treaties are mentioned with emphasis. And accordingly we find that in the body of the book great use is also made of the unilateral acts of states. The chapter on blockade, for instance, would have little left if the Dutch proclamations were taken out of it[2]. But in building on foundations of that character Bynkershoek was at one with Selden, Zouch, and the whole of the English school, who applied the doctrines of the English admiralty to the sovereignty of the narrow seas and the legal position of neutral commerce. Treaties however had been too much employed in introducing the rule "free ships free goods", in opposition to the Consolat del Mar and the doctrines of the English admiralty, to be regarded in the same quarter with equal favour. The English school drew from a treaty, at least presumptively, the inference that the rule which it adopted was not that which existed in the absence of treaty; else what necessity was there for a stipulation on the subject? Bynkershoek was on the same side as to the particular question of "free ships free goods[3]", but he would have contended that, when treaties of a certain purport become numerous enough,

[1] U. S., *ad lectorem.* [2] U. S., l. 1, c. 11.

[3] U. S., l. 1, c. 14. "One or two treaties differing from custom do not change the law of nations:" u. s., l. 1, c. 10.

the question is no longer what is the rule in the absence of treaty, but whether the rule they adopt is not, now at least, to be deemed the most consonant to reason. That mode of looking at treaties is of course approved by those whose devotion to reason as the only source of the law of nations is less qualified than was Bynkershoek's, and he is justly credited with its authorship.

Lastly, what is the reason which is of so much account even in the system of Bynkershoek? If men differ about it, what common ground is there for disputants? Hardly any but the Roman law, to which an appeal is frankly made[1]. Outside this we find arguments drawn from a state of nature believed or feigned to have preceded human institutions, but about which there could be no certain knowledge, or from any other consideration thought appropriate to the matter for the moment in hand. Evidently the school which leans to reason will try to find some better foundation than those which have contented the school which leans to custom.

Wolff.

Few names which have been great in their day have sunk deeper into oblivion than that of Wolff, whose philosophy reigned in Germany during the interval between Leibnitz and Kant, yet he has left a mark on international law. Having already written on natural law, he published in 1749 a ponderous treatise entitled *Jus Gentium methodo scientifica pertractatum, in quo jus gentium naturale ab eo quod volun-*

[1] *Non quod in iis quae sola ratio commendat a jure Romano ad jus gentium non tuta sit collectio, sed quod Paulus agat de magistro qui &c.*: u. s., l. 1, c. 14.

tarii pactitii et consuetudinarii est accurate distinguitur. He starts from the principles that by association in a state all its citizens are obliged in conscience to promote the common good and the sufficiency tranquillity and security of the life of each; that this duty further obliges them to maintain their association in the state, without which it cannot be fulfilled; and that it is consequently the duty of a state to preserve itself as an association of its citizens, to perfect itself in all things necessary to its end, and to avoid every thing tending to its destruction or imperfection (§§ 28—31, 33, 35, 36). Next he invokes the principle, which he considers himself to have proved in his previous writings, that the law of nature gives men a right to those things without which they cannot satisfy their obligations of duty; and it follows at once that states have a right to those things by means of which they may avert their destruction and what tends to it, or without which they cannot perfect themselves or avoid what tends to their imperfection (§§ 32, 34, 37). The legacy of Wolff to international law is this doctrine of abstract rights, or of rights to things inherent in persons and states and determining their mutual relations in respect to those things, put in place of the doctrine that rights flow from the disposition made of things by law. The meeting point of the two doctrines is in the admission which every one must make, that there is a distributive justice by which law ought to be guided[1]; but to set up inherent rights as the measure of distributive justice is to invite conflict, for what two men or what two states require in order to avert their destruction or to promote their perfection may be incompatible.

[1] See above, pp. 39—41.

Wolff appears to accentuate the conflict when he treats nations as members of a *civitas maxima* (§§ 9, 10), and as bound to one another by duties equal in extent to those which they owe themselves, only differing in the priority which he grants to the latter (§§ 156, 206). But he tries to part the litigants. "Since", he says, "every nation owes to every other nation what it owes to itself, so far as the latter does not possess it and the former can furnish it without neglect of its duty to itself, and every nation is free and by virtue of natural liberty every one must be allowed to be the judge of his own actions, it follows that every nation must be the judge of what it can furnish without neglect of duty to itself, and any other nation must put up with a denial of what it asks for; in other words, the right of a nation to what other nations naturally owe it is an imperfect one" (§ 157), and cannot be enforced (§ 158). Thus inherent rights are confronted by the maxim *beati possidentes*, a barrier so ineffectual in fact that it is scarcely needful to discuss its sufficiency in theory.

No nation ought to hurt another, and the notion of hurt is in natural law much wider than in civil law, and extends to every thing which impairs the perfection of another nation or of its condition (§§ 173, 645). Every nation has a perfect, that is an enforceable, right not to suffer hurt from another (§§ 252, 253): this is called the right of security, and arises even when the hurt is only intended (§ 254).

Christian Thomasius, with whose writings I am not acquainted at first hand, is said to have introduced in 1705 the nomenclature of perfect and imperfect duties for those of which the fulfilment can and cannot be enforced consistently with justice, in connection

with the principle that the only duties of the former kind are those which arise from the maxim "do not to others what you would not wish them to do to you", in other words, that negative duties alone belong to justice, affirmative ones being permanently relegated to the domain of morals[1]. That principle is practically identical with Kant's, whose system on this subject was based on liberty, to be enjoyed by each so far as compatible with the equal liberty of all, so that the only perfect and enforceable obligation is not to interfere with the liberty of your neighbour.

But neither in the form given to it by Thomasius nor in that given to it by Kant has such a limitation of the province of law received any great amount of favour, except in periods of reaction against over-legislation. It does not in the long run satisfy the exigencies of human affairs, nor does it atone by clearness for what it lacks in sufficiency. Even so illustrious an attempt as that made by the younger Mill to extract a definite limit to legislation from the notion of liberty serves for little except to give a wholesome bias to the mind, when considering the multitudinous claims to the intervention of law which assail it. Nor are we on surer ground if, with Wolff, we dangle inherent rights more largely conceived before the eyes, and fancy that we shall baulk the expectations we have raised by making men or nations judges in their own cause, as against those who would realise the rights by active measures. The distributive justice at which humanity aims will always defy set bounds, it will consent to be nothing less than Leibnitz's "charity of the wise", the best feelings coupled with the

[1] See Professor Lorimer's *Institutes of Law*, book I, chap. xi.

greatest wisdom to which the race has attained[1]. As that charity is developed the limit between perfect and imperfect rights will be placed at different points. The range of the former will not always be enlarged, the improvement of men may make it safe to extend the range of liberty. But the limit will not be an abstract one, settled *a priori*. It will never be possible to determine from the nature of a right alone whether it ought to be enforceable.

In connection with the international application of Wolff's doctrine a point remains to be mentioned which seems to have escaped him. For the full enjoyment of a right under the sanction of law it is often not enough that it should be recognised by the legislator, he must regulate it. Within a state, the regulation will accompany the recognition. The right will be recognised in certain circumstances and on certain conditions. Between states, the circumstances and conditions will in many cases bear no settlement by doctrine, none but by express agreement. Take the extradition of criminals for instance. Doctrine may lay down that extradition ought to be granted only for grave crimes, but it cannot determine precisely for what crimes. It may lay down that a *prima facie* case ought to be made out against the person accused, but not precisely what evidence not satisfying the usual requirements of the court ought to be received from abroad for that purpose. Or take the navigation of what are called international rivers, that is, rivers flowing through the territories of

[1] *Justitiam igitur, quæ virtus est hujus affectus rectrix quem φιλανθρωπίαν Græci vocant, commodissime ni fallor definiemus caritatem sapientis, hoc est, sequentem sapientiæ dictata.* Leibnitz, quoted by Lorimer, u. s.

more than one state. Doctrine may lay down that a state ought not to bar the peaceful passage across its territory along such a river, or hamper it by customs duties, but it cannot determine the measure in which those who use the passage ought to contribute to the cost of maintaining the navigation, or the regulations to which they ought to be subject for the security of the state across which they pass. Therefore extradition and the peaceful navigation of international rivers must be imperfect rights in the sense that conventions are indispensable to their due enjoyment. But it does not follow that there is in them no element of law or of perfect right. If a state persistently refused either to conclude proper conventions for extradition or to surrender fugitive criminals without them, it is not to be supposed that other states would feel themselves bound to put up for ever with its being an Alsatia, rendering the due repression of crime within their own limits impossible. Nor is it to be supposed that states desiring commerce with one other, which might well be what Wolff would have described as necessary to the perfection of their condition, would feel themselves bound to forego it for ever because a state across the territory of which it was necessary to pass along a navigable river was persistently churlish. Consequently between nations three degrees of right have to be admitted. Besides the claims to the enforcement of which by compulsion the general opinion of the civilised world would give no approbation, and those which it considers to be enforceable as they stand, there are claims which that opinion would certainly not be content to leave to the caprice of the states on which they exist, and which yet are not as a general rule enforceable until they have been em-

bodied in conventions. The first are only moral rights, the second are legal. The third have a legal basis, generally left without notice, but which in rare cases obtrudes itself on the attention and may justify action. Perhaps it would be convenient to reserve the term "imperfect rights" for the last, although Thomasius introduced it for moral rights.

Vattel.

Vattel was a native of the principality of Neuchâtel, then belonging to the king of Prussia, but served the elector-king, elector of Saxony and king of Poland, successively as *conseiller d'ambassade*, minister in Switzerland, and *conseiller privé du cabinet*. His famous work was published in 1758, under the title of *Le Droit des Gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*. Its philosophical principles are those of Wolff, of whom Vattel was a great though not a servile admirer, but its chief merit is on the practical side. It presents the law of nations as it then stood with a fulness of which there had been no previous example, including the topics which had grown up since the time of Grotius or on which Grotius had not dwelt, and on which Wolff had had little or nothing to say; and it does so from the point of view of a man versed in affairs, familiar with the customs which had been taking shape since the Peace of Westphalia, and duly appreciating their value. Its reputation was therefore as well deserved as it was immediate, and it must remain of lasting importance in the study of international law, as the focus in which the schools of

reason and custom were first brought together, and from which the succeeding divergences may be traced.

It is not necessary to pursue our historical sketch further. Indeed, if carried further, it could only display the operation, with regard to particular questions, of those general tendencies and principles of which we have seen the origin. Such operation can best be studied in relation to each question as it offers itself, but we may first spend a little time in fixing our own point of view.

CHAPTER VI.

THE PRINCIPLES OF INTERNATIONAL LAW.

1. THE society of states, having European civilisation, or the international society, is the most comprehensive form of society among men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and rights of states are only the duties and rights of the men who compose them.

2. The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a state, it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule.

3. The consent of the international society, defined as in the last paragraph, and given to a rule as an enforceable rule of law, is normally binding on the consciences of men in matters arising within the society and transcending the state tie, as state law is normally binding on the conscience within that tie. Such consent therefore normally determines the mutual duties and rights

of the states in which men are grouped. This is so because the international society is not a voluntary but a necessary one, and the general *consensus* of opinion among its members is the only authority that can make rules for it. The men who compose any state derive benefits from that society, and therefore cannot at their pleasure adhere to it in part and not altogether. The existence, in geographical proximity to the international society, of a state which was not bound by its rules, would be a source of intolerable inconvenience and danger to the members of the society. The social nature of man lies at the bottom of these reasons.

4. International rules ought to be made with due care that they shall not restrict liberty more than is necessary, that they shall be suited to the cases which most commonly arise, and that reciprocity in their application shall be possible. It is no reason for not applying a rule that a different one would have been better suited to the particular case.

5. In matters transcending the state tie, and so far as a rule founded on the consent of a society is wanting, the men who guide the action of states have only to obey their consciences. The want of a rule to define the action allowable does not exclude all action. The largest field for the application of this principle is in dealings with states or populations not having the civilisation necessary for forming part of the international society, but the principle is sometimes applicable between states included in that society.

6. When a state has to act although a rule is wanting, it ought as far as possible so to act that a rule might be framed on the precedent.

7. The obligation of international rules on the conscience, even when they have once been founded on

a general *consensus*, is subject to exception, as is the obligation of state law on the conscience. And in the former department the conscience will have a somewhat greater latitude than within a state, because there is no international legislature, and diplomatic agreements for the change of a rule can with difficulty be made to comprise so large a number of states as to prove that the general opinion has been changed; wherefore an international rule can rarely be changed otherwise than by its ceasing to be followed and general approval being given to such change of practice, of which some state must set the example. Hence it is not a conclusive, though a strong, argument against a state that it has itself applied the rule of which it resists the application. It would be contrary to the moral nature of man that he should be fettered, absolutely and permanently, by any external rule.

8. When a state is confronted by a rule which it deems to be bad, either originally or because it has become bad through a change of circumstances, it ought to take into account the greater or less evil which always results from violating known rules, and, if it decides to violate the rule in question, it ought as far as possible so to act that a better rule may be framed on the precedent. Neither in violating a rule nor in acting where a rule is wanting, is a state at liberty to consider only its particular case, without reference to the conduct which would be best suited to the cases which most commonly arise.

9. No law, national or international, will be durable unless it is fairly well adapted to the character and circumstances of the men who are to observe it. Hence the social nature of man, and his material and moral surroundings in the regions

and at the time in question, are the ultimate source of international law, in the sense that they are the cause why any rules of international law exist, and that they furnish a test with which any particular rules of that law must comply on pain of not being durable rules. And consent is the immediate source of international law, in the sense that the social nature of man and his material and moral surroundings may furnish principles of action, but only the consent of a society can establish rules.

10. The international society to which we belong, and of which what we know as international law is the body of rules, comprises—*First*, all European states. These, as explained in speaking of the Peace of Westphalia, form a system intimately bound together by the interests of its members[1]. Concert is another word used to express a system in this sense. The French text of the treaty of Paris, 1856, Art. 7, says that the Sublime Porte is admitted to participate in the advantages *du droit public et du concert Européens*, for which the English version has "of the public law and system (concert) of Europe." *Secondly*, all American states. These, on becoming independent, inherited the international law of Europe, as will be seen in the next paragraph, and they are as necessary parties as the European states for its further development. That they do not form part politically of the European system is due to the fact that, on account of their geographical situation, they do not desire to do so. *Thirdly*, a few Christian states in other parts of the world, as the Hawaiian Islands, Liberia and the Orange Free State. The same

[1] See above, pp. 55, 56.

cannot be said of all Christian states, not for instance of Abyssinia.

11. No new state, arising from the dismemberment of an old one within the geographical limits of our international society, has the option of giving or refusing its consent to the international law of that society. Since all obligations are ultimately those of men, the men who compose the new state were bound by that law as members of their former state, and they cannot by a unilateral act change the footing on which their intercourse with the other members of the international society is based.

12. Our international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it. Thus a large part of the relations between the European and American states on the one hand, and China and Japan on the other hand, is conducted on the footing of ordinary international law; but the former enjoy in the latter a consular jurisdiction, substituted for the rules of jurisdiction belonging to ordinary international law. By a singular anomaly a similar consular jurisdiction is still enjoyed by the other European and American states in the Turkish empire, although that empire has been admitted not only to the public law of Europe but even to the European political system. This is an instance of the way in which all human institutions, being free and not mechanical products, shade off from one to another.

13. There are claims between states to things the normal enjoyment of which requires definition and regulation not obtainable, in the absence of an international legislature, otherwise than by express

convention, but with regard to which general opinion does not leave it free to states to enter into reasonable conventions or to refuse them. Such claims are imperfect legal rights, and must be distinguished from the merely moral claims which a state is considered to be free to refuse. The extradition of criminals and the peaceful navigation of rivers flowing through the territories of more than one state are examples. These imperfect legal rights are analogous to the claims to which, within a state, effect can only be given by the legislature, but to which the sense of distributive justice prevailing in the state requires the legislature to give effect[1].

14. The best evidence of the consent which makes international law is the practice of states appearing in their actions, in the treaties they conclude, and in the judgments of their prize and other courts, so far as in all these ways they have proceeded on general principles and not with a view to particular circumstances, and so far as their actions and the judgments of their courts have not been encountered by resistance or protest from other states. Even protest and resistance may be too feeble to prevent general consent being concluded from a widely extended practice.

15. The arguments adduced by statesmen in despatches and other public utterances are very important as showing what were the principles proceeded on, especially in the case of treaties, which are so often concluded with a view to particular circumstances that great care must be taken in using them as evidences of international law.

[1] See above, pp. 74—76.

16. Special authority is often claimed for the practice of those states which are most concerned with a particular branch of international law, as for that of the chief maritime powers with regard to the laws of maritime war. There is a good foundation for such a claim in the fact that the powers most concerned with a subject must understand it best, and be best able to distinguish good from bad reasoning about it. On the other hand, special knowledge is often accompanied by the bias of special interest. But when the states most concerned with a subject in turn apply the same rules and suffer their application, that bias may be supposed to be eliminated, and the agreement which those concerned in the vast majority of cases find suitable must count for a general agreement in spite of much comparatively speculative criticism from other quarters.

17. The opinions of private writers must of course be counted towards the general consent of men, especially when the writer's reputation proves that he represents many persons besides himself. Moreover, for much of international law, which is so well observed that discussions about it between states are not easily quoted, its admission into accredited text-books is valuable testimony to its being observed as law, and not from any option still remaining free to states. And when a rule is disputed, or there is a question whether an old rule ought to be changed or a new one introduced, it is only through public discussion that reason can be made to appear and prevail.

18. Time cannot supply the want of general agreement, but where the agreement in favour of an altered or added rule is sufficiently general, it is an element in determining the limit of the forbearance to be shown to

a state which persists in resisting the change or the addition. When reasoning has stood the test of time, it can no longer be urged that it resulted from caprice, or from the undue consideration of a transitory interest.

CHAPTER VII.

THE EQUALITY AND INDEPENDENCE OF STATES.

The Independence and Legal Equality of States, and Semi-Sovereignty.

In Wolff, and through him in Vattel, the doctrine of the equality of nations appears in the following form. Being regarded as persons living in a state of nature, nations are naturally equal as men are naturally equal; a small nation is as much a nation as a large one, just as a dwarf is as much a man as a giant; it is therefore natural or necessary that all nations have the same rights and the same obligations, as much and no more being allowed to one nation as to another[1]. If we leave out the attempt at deduction contained in this, it amounts to no more than a statement of the fact that international law is a body of general rules. But besides that fact there is another. The general rules of international law apply in their fulness only to sovereign states like France or the United Kingdom, and to natural persons brought into relation with sovereign states, as is the case of pirates and blockade-runners. Between sovereign states and natural persons international law recognises groups of the latter

[1] Wolff, *Jus Gentium*, §§ 16, 17, 18; Vattel, *Le Droit des Gens*, §§ 18, 19 of the *Préliminaires*.

not on an equality with the former, of which Bulgaria may be taken as an example[1], and which may be classed together as semi-sovereign though they may and do differ in their particular condition and rights. When this second fact is taken into account, it results that the equality of states cannot usefully or even intelligibly be presented as a deduction unless the deduction also furnishes a test showing to what states it applies. Let us look at the truth as it stands.

Independence, like every negative, does not admit of degrees. A group of men dependent in any degree on another group is not independent, but has relations with that other group which as between the two are constitutional relations. Sovereignty is partible. A group of men is fully sovereign when it has no constitutional relations making it in any degree dependent on any other group: if it has such relations, so much of sovereignty as they leave it is a kind or degree of semi-sovereignty, though the constitution may not call it by that name. Thus the independence and the full sovereignty of a state are identical, but it would be an abuse of language to speak of semi-sovereignty as partial independence.

The constitutional relations between a semi-sovereign state and the state on which it is dependent may exclude the former from any public intercourse with foreign states, as in the case of the United States

[1] By Art. 1 of the treaty of Berlin, 1878, "Bulgaria is constituted an autonomous and tributary principality under the suzerainty of His Imperial Majesty the Sultan." And, by Art. 10, Bulgaria takes the place of the Imperial Ottoman Government in its railway obligations, as well pecuniary as with regard to the working of the railways, and both towards the companies and towards Austria-Hungary; and "the conventions necessary for the settlement of these questions shall be concluded between Austria-Hungary, the Porte, Servia and the principality of Bulgaria immediately after the conclusion of the peace."

of America and the so-called sovereign states comprised in the union. Or they may permit such intercourse within certain limits, and with the difference that the whole may not be able to compel the parts to observe those limits, as in the case of the Holy Roman Empire which was dissolved in 1806, or may enjoy enough both of material strength and of popular good will to make obedience to its constitution practically secure, which is doubtless the case of the present German empire[1]. And there may be this other difference, that foreign states may be parties to the constitutional arrangements by which a semi-sovereign state is allowed to have a limited public intercourse with them, as in the case of the Holy Roman Empire by the Peace of Westphalia, and in that of Bulgaria by the treaty of Berlin, or those arrangements may have been made without the concurrence of any foreign power, as in the case of the present German empire.

The result of the foregoing is that the states between which the rules of international law prevail in their fulness are, *First*, those which are sovereign and independent constitutionally as well as internationally, such as France and the United Kingdom; *Secondly*, those which other states accept in their dealings with them as being sovereign and independent, although they may be nominally hampered by a weak constitutional tie. Of the latter class there

[1] See above, pp. 56, 57, as to the Holy Roman Empire. The constitution of the present German empire reserves to the imperial authority all treaties of peace, of alliance or for any other political objects, all commercial or postal treaties, and all treaties relating to copyright, extradition, domicile, emigration or the administration of civil or criminal law. But diplomatic relations between foreign powers and the states of the empire are not entirely excluded, and England has ministers resident or *chargés d'affaires* at many of the German capitals.

is perhaps no example at present, but the states of the Holy Roman Empire were formerly examples of it. The states of both classes, as far as they exist or have existed, deal with one another on the footing of equality in the sense of Wolff and Vattel, that is, they admit the identity of rights and obligations for all, which is merely to say that the international law which they recognise is a body of general rules and not of particular solutions.

Thus the duties of neutrality are the same for a weak state as for a powerful one, though they may be burdensome to the one and easy to the other. The weak state must endure the burden as long as it clings to its independence. And this equality, as it is not necessarily connected with any constitutional or other antecedent character in the states enjoying it, but is essentially attached to independence in fact, cannot be deduced by reasoning from any higher source than the fact. The states which do not enjoy it while at the same time possessing certain foreign relations, because the constitutional tie which limits their sovereignty is internationally respected, are semi-sovereign internationally as well as constitutionally, and the dealings between them and foreign states which their constitutional limitation permits are conducted on the basis of ordinary international law so far as applicable. Where on the other hand, as in the case of the United States, the component parts of an independent state are effectually precluded from having any foreign relations, not only can the constitutional condition of those parts not really exceed semi-sovereignty, by whatever name it may be graced, but internationally they are not even semi-sovereign, they have no international existence at all.

The word "suzerainty" is used in the treaty of Berlin to express the relation of the Sublime Porte to the principality of Bulgaria, which it created. That, in the middle ages, was the proper term for the relation of a feudal superior to his vassal, while "sovereignty" was more properly superiority in jurisdiction, the highest court in a territory which was distinct for judicial purposes being called a *cour souveraine*. The queen is our sovereign because she is "over all persons and in all causes within her dominions supreme." Consequently a modern description of a state as subject to a suzerainty does not by itself shut it out from any of the rights that were enjoyed by the states of the Holy Roman Empire, which were internationally accepted as sovereign states, and were so called, while they recognised the empire as their suzerain power. How many of those rights it is intended that the state in question shall enjoy must be ascertained from the more detailed provisions of its constitution.

Questions sometimes arise whether a certain whole is a federal state or a federation of states, and whether a certain union of monarchies is real or personal. The notions of full and partial sovereignty appear sufficient to cover the former question and to guide to an analogous solution of the latter. If *de facto* the whole of the union confronts all foreign powers as the exclusive representative of its territory and population, it is internationally a federal state or a real union. If *de facto* the several portions entertain any relations with foreign powers, then for the international lawyer the whole in strictness of language can only be a federation of states or a personal union, although it might be pedantic to insist on such strictness where

the foreign relations possessed by the several portions were of trifling importance. Thus I should not propose to call the present German empire anything but a federal state, so long as the justification for giving it that name is distinctly understood. From these principles of nomenclature, if they are accepted, it seems to follow that a personal union may grow into a real one by habit, without any change of constitution. Thus, when James the Sixth of Scotland became James the First of England, the union between the two countries was only personal. James remained at peace with Spain as king of Scotland, but was at war with Spain as king of England until the war which existed at his accession was closed by a treaty of peace. But it would surely be pedantic to say that in the international sense the union was still only personal under William the Third, and under queen Anne at the date of the battle of Blenheim. No British or foreign statesman then dreamt of different treaties or different terms for England and Scotland as being possible, nor were England and Scotland represented by different negotiators. The case of Hanover was not the same as that of Scotland, rather because the king negotiated for that country through his Hanoverian ministers than because the Salic law might carry the crown of Hanover to a different sovereign, as it ultimately did. The dominions which had been personally united in the Hapsburgs came to be regarded internationally as one state long before a constitutional tie had been established between them, or the Pragmatic Sanction had obviated the danger that a female succession might carry Hungary to a different line from Austria.

The Political Inequality of States, and the Great Powers of Europe.

When a matter arises, and the states which are agreed as to the mode of dealing with it carry their plan into effect as far as it is possible to do so by their own action, without directly compelling a state which does not agree with them to join in their action and without directly affecting that state, they do not violate its independence. But their action may indirectly compel that state to join in it, or to endure without opposition a conduct which it deems to affect it injuriously though indirectly, or of which it disapproves in the general interest of the European system. In that case a political victory has been gained over the state in question. And a state may be so weak that it is not much or at all consulted by other powers, and that little attention is paid to its opinion if given. In that case it is in a situation of political inferiority, and many states of the European system are permanently in such a situation towards what are called the great powers, yet their legal equality is not necessarily infringed thereby. It is true that politics are not law, but an adequate motion of a body of law cannot be gained without understanding the society in and for which it exists, and it is therefore necessary for the student of international law to appreciate the actual position of the great powers of Europe.

At no time and in no quarter of the globe can small states ever have been admitted by large ones to political equality with themselves, and the eighteenth century in Europe was certainly no exception to that rule. But in that century the balance of power was the chief study in international politics, and the great

powers were usually divided into two nearly equal bodies. These were not always composed of the same members: Austria, for instance, was allied with England in the war of the Austrian succession and with France in the Seven Years' War. Yet, in whatever direction a minor sovereign deemed that his interest pointed, there was a strong body to which he could bring an assistance by no means to be despised in a contest against another body of nearly equal strength. In no war of the age was the division of Europe so unequal as in that of the American revolution, in which England stood alone while the larger part of the Continent was arrayed against her either in hostility or in unfriendly neutrality. But then some of the smaller powers, whose importance at sea was far greater than by land, were brought into prominence by the maritime character of the struggle. What was wanted in order to bring the contrast between the great powers and the lesser ones into a strong light was a crisis on the main aspect of which all or nearly all Europe should be united, while its management should raise questions of some though only minor importance. Then it would be seen how far the great powers would assume the management of such a crisis to themselves, even in points deeply interesting to the smaller ones. The opportunity was afforded by the fall of Napoleon and the arrangements which became necessary in consequence of it.

The war which led to the first fall of Napoleon and the restoration of Louis XVIII was ended by what is called the treaty of Paris, but which was in reality four treaties concluded 30th May, 1814, in the same terms, between the restored king of France on the one hand and England, Austria, Prussia and

Russia respectively on the other hand. It was of course a foregone conclusion that France should be deprived of the immense conquests she had made, and accordingly by Art. 3 of the treaties the new boundary of France was fixed and she renounced all that lay beyond it, without saying to whom. Then Art. 32 provided that all the powers which had taken part in the war should send their plenipotentiaries to Vienna, "to settle in a general congress the arrangements which are to complete the dispositions of the present treaty." To those treaties the three other powers which had been allied with the four in the war against Napoleon, Spain Portugal and Sweden, acceded. But each of the treaties with the four great powers contained secret articles, of which the first ran thus: "The disposition to be made of the territories which His Most Christian Majesty renounces by the 3rd Article of the public treaty, and the relations from which a system of real and lasting equilibrium in Europe is to result, shall be settled at the congress on the bases determined by the allied powers among themselves, and in accordance with the several dispositions contained in the following articles." Then followed an outline sketch of the mode in which Europe was to be reconstituted, leaving however much matter of the highest importance to be filled in.

Thus the congress which the public treaty charged with making the new arrangements was to be composed of all the powers which had taken part in the war, a description that primarily included France and her seven allied antagonists, known collectively at the congress as the eight powers. Strictly the description would also have included the sovereigns who, as the wave of reconquest passed westward, had abandoned

the fortunes of Napoleon or been restored before the close of the war on the principle of legitimacy; and in fact all Europe was represented at Vienna except Turkey and the principalities dependent on her, but although the other states had to sign the particular arrangements which concerned them, the general act of the congress was prepared for signature only by the eight and was signed only by seven of them. By the secret articles however the five great powers, including France, pledged the congress in advance of its meeting to a large part of the settlement; and when the plenipotentiaries were assembled, it appeared that the four great powers other than France understood that they alone, as the allied powers mentioned in the first secret article, were to decree the rest of the settlement. With what skill Talleyrand gained the admission of France to the inner conclave belongs to the general history of Europe and to the particular history of the principle of legitimacy. He did not carry his point without appealing to the powers of the second order, but when it was carried "the committee of the five great powers" formally constituted itself, and meetings of the eight powers were recognised, but no general meeting of the congress ever took place. A "German committee" was also recognised, consisting of Austria Prussia Bavaria Wurtemberg and Hanover, and having for its province the organisation of a Germanic confederation. But when Wurtemberg declared in it that she could not bind herself about the constitution of such a confederation till it was known what the possessions of each member of it would be, Metternich replied for Austria and Prussia that all which related to what he called the political question, by which he meant terri-

torial arrangements, was outside the competence of the committee, the great powers having reserved to themselves to pronounce on such matters, and that enough was known about them in a general way for settling the act of confederation. The king of Wurtemberg was not satisfied with this answer, and reasonably, for the fate of Saxony was still undecided, and the "German committee" ceased to meet. Afterwards the five great powers agreed among themselves that the king of Saxony should be deprived of two-fifths of his dominions in favour of Prussia, and his consent to cede them was compelled by restraining his personal liberty till he had given it, which must be considered to have vitiated any title derived from such consent. But that circumstance was unimportant, for the king had been faithful to Napoleon to the last, and his dominions might therefore have been disposed of by right of conquest, and indeed England Russia and Prussia had been willing to carry out the arrangement on that basis, and dispense with an enforced signature.

This was the state of things when Napoleon returned from Elba, except that the king of Saxony had not then agreed to the dismemberment of his dominions, though the five great powers had determined on it. In face of the danger caused by Napoleon's easy recovery of his throne, the great German powers showed a more conciliatory spirit towards the smaller ones, the negotiations for the establishment of the Germanic confederation were hastened and completed by signature on 8th June, 1815, and on the following day the general act of the congress was signed by the eight powers except Spain, Talleyrand and his colleagues being permitted to sign on behalf of Louis XVIII though he was an exile at Ghent, and

a few remaining questions being handed over to the states directly concerned in them for settlement between themselves. The reasons given by Spain for refusing her signature were "(1) that the act included a stipulation contrary to the immediate and complete restitution of the three duchies of Parma, Placentia and Guastalla; (2) that the plenipotentiaries of Austria Russia Great Britain France and Prussia had no power to determine the destiny of Tuscany and Parma without the concurrence of the Spanish plenipotentiary; and (3) that the act included many articles which had not been reported at the meetings of the plenipotentiaries of the eight powers." Meanwhile a new European alliance against Napoleon had been formed, Sweden not joining because she was too much occupied in her peninsula by the present of Norway which had been made her against the will of the Norwegian people, and Spain refusing her accession because "the dignity of her crown and the importance of the services which her subjects had rendered to the European cause did not permit her to accede to a treaty of alliance if she was not considered to be a principal party in it; if the accession which was proposed to her was understood in that sense, the king was ready to give it; otherwise he would act in concert with the other powers so far as concerned military operations, but when it came to treating he would treat in his own name, and would not consider himself to be comprised in what the plenipotentiaries of the other powers might stipulate".

Short as was the campaign of Waterloo, several of the smaller powers had taken part in it and all had moved troops or at least incurred expense. Accord-

ingly they claimed admission to the conferences for settling the terms of peace. The four great allies however informed them on 10th August 1815 that they did not think fit to comply with their desire, and that they would communicate nothing until they had agreed among themselves on the principles which were to govern their relations with France and on the conditions to be exacted from her. The treaty of peace concluded on 20th November by France with Austria Russia Prussia and England placed the territorial renunciations of France at the disposal of the other contracting parties, and stipulated that the pecuniary indemnity which France agreed to furnish should be paid to them. They, in advance of the treaty, had determined the disposition of the ceded districts by a protocol of 3rd November, and that of the pecuniary indemnity by one of 6th November; and the smaller states submissively took the shares of territory and money which were thus assigned to them.

Such was the commencement of what during a long succeeding period was described as the moral pentarchy of Europe, pentarchy because France was readmitted to it at the Congress of Aix-la-Chapelle in 1818. It has been necessary to dwell on it in some detail because the origin of a movement is usually its most instructive part, and especially is that so when we are tracing an authority the exercise of which is veiled under legal forms, the necessary signatures being usually obtained in the end without always leaving an official trace of how they were obtained. In that respect the authority of the great powers in Europe may be likened to that of the house of commons in the British constitution: how much of

real independence is implied by the concurrence of the crown and the house of lords can only be known from the history of earlier struggles: machinery is apt to work smoothly when the power of its different parts to resist has been tested and is known. For a time the pentarchy was worked with great effect in the interest of the principle of legitimacy[1], but common action in that direction was broken up through the change made in the policy of England by Canning, that made in the policy of Russia by the Greek insurrection, and that made in the policy of France by the same insurrection and the revolution of 1830. Still, in spite of dissensions between the great powers which at times brought them to the verge of mutual war, the skill of statesmen was able to preserve enough of common action to impose on Holland and Belgium the terms of their separation, and to deal with several phases of the Eastern question. From 1848 the pentarchy must be said to have altogether ceased to exist, but the causes which determine the mutual relations of large states and small ones within the same political system lie deep in the nature of things, and while Berlin in 1878 reproduced on a smaller scale Vienna in 1814 and 1815, it was able to do so with less friction because the controlling authority of the great powers in congress was no longer novel, but had sunk so far into European habits as to carry moral as well as material weight. There can be little doubt that for that reason it was easier for Russia to submit to the treaty of San Stefano being cut down to the treaty of Berlin, but our present subject is more concerned with the attitude of the congress towards

[1] See above, p. 58.

the smaller states. Servia and Roumania had been semi-sovereign, with the power of entering into limited foreign relations: their independence was recognised. Montenegro had already been recognised as independent by all the great powers except England and Turkey: those powers also recognised its independence. The boundaries of all three were modified, Servia and Montenegro being enlarged and Roumania compelled to submit to an exchange of territory, and in all three it was provided that religion should be free and should be no cause of incapacity. Greece was an independent state of half a century's standing: an enlargement of her territory at the expense of Turkey was recommended to the latter by the other six great powers[1]. Yet neither Roumania Servia Montenegro nor Greece was a party to the treaty of Berlin, nor was Greece a party to the protocol of the congress recommending the enlargement of her territory, nor was she a party to the convention of 24th May 1881 by which the seven great powers, Turkey being this time a party, fixed the limits of the enlargement which she was to receive. No doubt all these arrangements were subsequently accepted by the states concerned, and what was treated as an acceptance of her new limits had been obtained from Greece before the convention of 24th May 1881 was signed, but was not recited in the convention. Still, when no such acceptances were thought to be even formally necessary to a declaration of the will of Europe on the several matters, we can appreciate what political inequality is compatible in the European system with legal equality. The

[1] Six, because Italy had been added since the days of the pentarchy: Germany had taken the place of Prussia.

fact is not one to be condemned. It may prove to be a step towards the establishment of a European government, and in no society can peace and order be permanently enjoyed without a government. But the fact is one which the student of international law is bound to note, whatever development may await it.

The Equality of States in Civilisation, and the Protection of Subjects abroad.

Throughout Europe and America, if we except Turkey, habits occupations and ideas are very similar. Family life, and social life in the narrower sense of that term, are based on monogamous marriage and respect for women. The same arts and sciences are taught and pursued, the same avocations and interests are protected by similar laws, civil and criminal, the administration of which is directed by a similar sense of justice. The same dangers are seen to threaten the fabric of society, similar measures are taken or discussed with the object of eluding them, and the same hopes are entertained that improvement will continue to be realised. The literature which is occupied with the life and destiny of man, which entertains him and expresses his most intimate feelings, is read everywhere from whatever country it emanates. There are differences of detail, but no one who has had a liberal education feels himself a stranger in the houses, schools, law courts, theatres, scarcely even in the churches, of another country. Not only is there a great circulation of people regardless of territorial boundaries, but the native subjects of one state travelling or resident in another do not form a class apart; they mix freely with the population, and usually feel themselves safe

under the local administration of justice. All this is summed up by saying that Europe and America have a common civilisation.

Turkey and Persia, China, Japan[1], Siam and some other countries have civilisations differing from the European, and so far as they are not Mahometan from those of one another. The Europeans or Americans in them form classes apart, and would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection to the unfamiliar interests arising out of a foreign civilisation. They are therefore placed under the jurisdiction of the consuls of their respective states, pursuant to conventions entered into by the latter with the local governments. The consuls are allowed to dispose of small forces, but the maintenance of their jurisdiction must depend in the long run on the support which the local governments give them pursuant to the conventions. But the latter could not furnish that support if each of the countries in question did not possess an old and stable order of its own, with organised force at the back of it, and complex enough for the leading minds of the country to be able to appreciate the necessities of an order different from theirs. Such countries therefore must be recognised as being civilised, though with other civilisations than ours.

The international law with which we are concerned having arisen among the former of the two classes of populations here contrasted, it is based on the possession by states of a common and in that sense an equal

[1] I write of facts as they stand, without expressing any opinion on the desire felt in Japan to be freed from the consular jurisdiction as having become unnecessary there.

civilisation. The case of Turkey must in this part of our subject be left out of sight, because of the anomalous position of that empire, included on account of its geographical situation in the political system of Europe, but belonging in other respects rather to the second group of contrasted populations. She may benefit by European international law so far as it can be extended to her without ignoring plain facts, but her admission to that benefit cannot react on the statement of the law, which is what it is because it is the law of the European peoples. The common civilisation then, explained as it has here been explained, contains the principle that the institutions, whether of government or of justice, which the inhabitants of a state find suitable to themselves, must normally be accepted as sufficient for the protection of foreigners among them. Those foreigners are subject to the local courts and authorities, and not to separate jurisdictions, and their own governments will not, normally, interfere for their protection so long as they enjoy equal treatment with natives.

Van Bokkelen, a citizen of the United States, was imprisoned for debt in Hayti, and if he had been a Haytian could have obtained his release by making an assignment of his property in favour of his creditors (*cessio bonorum*). There appears to have been something in the laws of Hayti, I do not clearly gather what, which probably laid him under no express incapacity to do this, but at least made it impossible for him as a foreigner to do it. The United States interfered and obtained his release from prison, Mr Bayard, secretary of state, writing that "to close to an alien litigant some given channel of recourse open to a native, without leaving open some equivalent recourse,

is a denial of justice[1]." Reference was also made to a treaty, but it was not clear on the point: any one who questioned the principle of international law would also have questioned the interpretation of the treaty. The principle however is clear: there must be no unfair discrimination against a foreigner.

The example also illustrates how, in spite of the common civilisation, cases arise in which unfair discrimination is attempted, or in which other circumstances arise to prevent the normal rule of non-interference applying. The civilisation has grown up by degrees, and populations have become included in it among whom it did not originate. It may not everywhere have adequately permeated institutions and habits of action. Even where its normal reign is assured, political religious or other excitements may rouse the passions to break through the crust which has been formed over them. If, from whatever cause, the security promised by the common civilisation is flagrantly wanting, the fact must override the presumption. "Justice," Vattel says, "is denied, 1°, by refusing to hear your complaints or those of your subjects, or to admit the latter to establish their right before the ordinary courts; 2°, by interposing delays for which no good reasons can be given, and which are equivalent to a denial or still more ruinous; 3°, by a manifestly unjust and partial judgment. But the injustice must be very evident and palpable[2]." It must be evident and palpable to the general *consensus* of the part of the world which possesses European civilisation, and not turn on the omission of some security to an accused person or a

[1] Wharton's *Digest of the International Law of the United States*, § 230, vol. 2, p. 643.

[2] *Le Droit des Gens*, liv. 2, ch. 18, § 350.

litigant, such as trial by jury, which does not enter into the common law of that part of the world.

When the law of a country, such as it is, is violated towards foreigners, there is in ordinary circumstances a right of interference on their behalf. The principle of equality of treatment with natives can scarcely operate, because, if the law of the land were violated towards all alike, there would not exist anything that could claim to be recognised as a civilised government. But in any country disturbances may arise so serious as to make it necessary for the government to strain the law with a view to restore order, either in pursuance of some constitutional power vested in it, or in reliance on a legislative indemnity to be procured when possible. What is to be said if in such a case the law is violated towards foreigners just as towards natives, without greater harshness than in most countries of European civilisation the emergency would be held to warrant, not imprisoning any one without reasonable ground of suspicion, and not punishing any one without reasonable proof of guilt? This question was much discussed at the time of the civil war in the United States, in connection with the suspension of the *habeas corpus* by president Lincoln as a measure applicable equally to citizens and to foreigners; and it was complicated by the further discussion, in the United States themselves, whether that suspension under the so-called war power was within the constitutional right of the president. Earl Russell, then British secretary of state for foreign affairs, ultimately acquiesced in the suspension as regarded British subjects, having regard to the quantity of opinion which there was in the States in favour of its being constitutional, and being unable to say that the detentions under it were without

reasonable grounds of suspicion. The strongest case was perhaps that of Rahming, in whose favour the Supreme Court issued an attachment against the military commandant who, under orders from the executive, refused to obey the writ of *habeas corpus*. Mr Hall says of the case that "a sovereign, if bound to abandon his subjects to any moderately reasonable law, however hardly it may press on them, is not bound to allow them to be treated in defiance of law, even though they may be so treated in common with all the other inhabitants of the territory in which they are. In the particular case the authority of the Supreme Court" [as to the law] "was undoubtedly superior to that of the executive[1]." With great deference, I think that in the circumstances England had nothing to do with the constitutional question. An emergency had arisen which in most European and American countries would be met by an assumption of power if no reserve of constitutional power existed with which to meet it, and it therefore seems impossible that there should be any general *consensus* of the international society condemning that mode of meeting it. And the mode would be condemned, very probably to the extent of frustrating its employment, if its application to foreigners in the country gave their governments any other right than to see that they were treated on an equality with natives, without undue harshness, and with reasonable grounds in the case of each person. In the instance furnished by the American civil war, the assumption of power by president Lincoln was approved by whatever in the northern states could claim to represent those states towards England, and

[1] *Treatise on International Law*, § 87, 3rd edn., p. 277.

it was scarcely our right to inquire whether that approval was the approval of the majority, or whether it arose from a conviction of the constitutionality or of the necessity of the course adopted. If the Supreme Court was correct, the result would be that the president, at the worst, was in the position of a successful striker of a *coup d'état*, and international recognition is not denied to the acts of strikers of *coups d'état* whose power is *de facto* established.

A very important question is whether the normal rule of non-interference for the protection of subjects in foreign countries applies to the protection of the interests which they have under contracts with foreign governments. Here a distinction seems to exist between the case of bonds forming part of a public loan on the one hand, and private contracts, such as those for concessions or for the execution of works, on the other hand. Interests of the latter kind usually enjoy regular protection by law, notwithstanding that the government is the defendant against whom relief is to be sought. There is a petition of right, a court of claims, or an appropriate administrative tribunal before which to come. The case is not essentially different from any other arising between man and man. The foreigner who has contracted with the government has not elected to place himself at its mercy, and the normal rule of equal treatment with natives requires that he shall have the full benefit of the established procedure, while if in a rare instance there is no such established procedure, or it proves to be a mockery, the exceptional rule of protecting subjects against a flagrant denial of justice also comes in. But public loans are contracted by acts of a legislative nature, and when their terms are afterwards modified to the disadvantage of the bond-

holders this is done by other acts of a legislative nature, which are not questionable by any proceeding in the country. If therefore the normal rule of equal treatment with natives be looked to, the foreign bondholder has no case unless he is discriminated against. And if the exceptional rule of protecting subjects against a flagrant denial of justice be looked to, the reduction of interest or capital is always put on the ground of the inability of the country to pay more—a foreign government is scarcely able to determine whether or how far that plea is true—supposing it to be true, the provisions which all legislations contain for the relief of insolvent debtors prove that honest inability to pay is generally regarded as a title to some consideration—and the holder of a bond, which in case of default was never otherwise enforceable than through the intervention of his government, is trying, when he seeks that intervention, to exercise a different right from that of a person whose complaint is the gross defect of a remedial process which by general understanding ought to exist and be effective. The one would make his government his debt-collector, the other stops far short of that point. Hence the propriety of intervention is not questioned when justice is denied by a government on its private contracts; it is treated as a matter of expediency whether in a particular case the intervention should be granted to the claimant. But the common practice is to refuse intervention to the sufferers by defaults on public loans, unless the defaulting government presumes to treat its internal and external debts on terms of inequality unfavourable to the latter. It must however be mentioned that Mr Hall, in opposition to the doctrines here supported, sees no difference in principle between

the private contracts and public loans of a government, though he admits the difference in practice relating to them. And he quotes Lord Palmerston and Lord Salisbury as maintaining the view that the right of intervention on behalf of bondholders is unquestionable, and that its exercise ought to depend on the balance of considerations, the amount of loss in the particular instance being weighed against the general expediency of discountenancing hazardous loans[1]. On the other hand, the accepted principles of the United States seem to be in accordance with the doctrines here supported[2].

[1] *Treatise on International Law*, § 87, 3rd edn., pp. 277—280.

[2] "What the United States demand is that in all cases where their citizens have entered into contracts with the proper Nicaraguan authorities, and questions have arisen or shall arise respecting the fidelity of their execution, no declaration of forfeiture, either past or to come, shall possess any binding force unless pronounced in conformity with the provisions of the contract, if there are any; or if there is no provision for that purpose, then unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just and that the decision ought to be submitted to. Without some security of this kind, this government will consider itself warranted, whenever a proper case arises, in interposing such means as it may think justifiable in behalf of its citizens who may have been or who may be injured by such unjust assumption of power." Mr Cass, secretary of state, 25th July 1858; in Wharton's *Digest of the International Law of the United States*, § 232, vol. 2, p. 661. "There have been instances however in which our ministers have received instructions of the character proposed [to collect foreign bonds (*Wharton*)] to the extent of permitting them to accept payment from a foreign government on account of the principal or interest of its obligations. Such permission however was preceded by the assumption that the foreign government was ready and willing either to make the payment or to negotiate with its creditor in such connection, and where the intervention of a consular or diplomatic agent of the creditor's country was a convenience to both." Mr Frelinghuysen, secretary of state, 12th January 1884; ib. p. 662.

CHAPTER VIII.

INTERNATIONAL RIGHTS OF SELF-PRESERVATION.

Self-preservation as an alleged Primary Right.

WHEN a fully sovereign state employs force in its own territory, or on the high seas on board a ship which carries its flag as belonging to itself or to its subjects, or when by its laws it threatens its subjects with punishment on their return for their acts committed abroad, its independence is internationally its sufficient warrant. For the sovereignty of a state extends over its subjects, over its territory, and over the ships which carry its flag on the high seas; and full sovereignty is independence[1]. But when a state employs force in the territory of another state, or on the high seas on board a ship which carries the flag of another state as belonging to it or to its subjects—or when it attempts by threats to restrain the freedom of action of another state within the territory of the latter, or that of the subjects of another state elsewhere than within its own territory or on the high seas under its own flag—the state so acting or threatening must find its justification in some other principle.

[1] See above, p. 87.

The principle commonly put forward on such occasions is that of self-preservation, which writers on international law often class among their fundamental, primitive, primary or absolute rights. It is no doubt a primitive instinct, and an absolute instinct so far as it has not been tamed by reason and law, but one great function of law is to tame it[1]. Accordingly law does not permit us to ward off danger from ourselves by transferring it to an innocent person. When a shipwrecked crew is in danger of starvation, it is not lawful for them to kill and eat one of their number, however pressing the necessity[2]. Liability to suffer hurt, whether in person, in property or in rights, and whether by sentence of law or by private action which the law permits, presupposes a duty violated by the person who is to suffer it. When a small injury is inflicted in obedience to an almost irresistible impulse, the law may overlook it, but in principle we may not hurt another or infringe his rights, even for our self-preservation, when he has not failed in any duty towards us.

It is easily seen that this must be so between states as well as between natural persons. That conclusion is necessary for those who regard states as technical persons for whom and for natural persons legal principles are identical, while if we look at the substantial difference between a state and a natural person, we shall find that the case of the former is at least not more favourable than that of the latter for pushing self-

[1] See above, p. 5.

[2] *Queen* v. *Dudley and Stephens*, 14 Q. B. D. 273, decided unanimously by Lord Chief Justice Coleridge, Justices Grove and Denman, and Barons Pollock and Huddleston. Their lordships also stated that they had Justice Stephen's authority for repudiating an inference in favour of the contrary opinion which had been drawn from some passages in his writings; p. 286.

preservation to an extreme. In the case of a state it would be difficult to say more in support of the right than what Wolff said, that a state ought to preserve and perfect itself as an association of its citizens in order to promote their common good[1]. But although it is certainly indispensable for the welfare of men that they should be associated in some state tie, it does not follow that their welfare imperatively requires the maintenance in its actual limits, and with resources entirely unimpaired, of the particular state tie in which they happen to be engaged. Nor can the international society be quoted as having consented to an absolute right of self-preservation. A society can only consent to rules: the principles in which their justification is sought must be left to appreciation by individual men. But since the cases in which the right of self-preservation is alleged are precisely those in which it would clash with the right of independence, which is equally asserted by the advocates of abstract rights, it follows that no rules, but confusion, must result from recognising either right as absolute.

Nevertheless the view which adopts primary rights as the foundation of law has struck such deep root during the last century and a half, that the tendency has prevailed more and more to understand *droit* or *jus*, when not expressing a particular right, as expressing a body of rights rather than a body of law. So while the predominant meaning of *le droit naturel* or *jus naturale*, down to the end of the seventeenth century, seems to have been what we call in English natural law, that is a body of rules at one time believed to be ascertainable and primary, those terms seem now

[1] See above, p. 71.

to have acquired for their predominant meaning that of a body of rights believed to exist by nature, and to secure which is supposed to be the primary function of law. In the same spirit M. Pillet, in a remarkable recent article, contends that the rules prevailing between states, so far as they are founded on certain primary rights which he regards as extending beyond the international society, are treated only by a defect of method as belonging to *le droit des gens* or *le droit international*, and that what they really belong to is *le droit commun de l'humanité*[1]. Those who have followed me thus far will be aware that I maintain the definite line which in England has always been drawn round the notion of law. The considerations in which the notion of primary rights is founded cannot indeed be ignored, but their proper place is in that distributive justice which ought to govern in questions, whether national or international, *de lege ferenda*. Such rights are only moral till the law recognises them, and between moral and legal rights there is a grave practical difference. And when a term, be it *droit* or *jus*, which is the only one available for describing a body of law[2], becomes mixed up with the notion of rights, it is especially international relations that suffer, because they

[1] *Le Droit International Public. Ses éléments constitutifs, son domaine, son objet.* In the *Revue Générale de Droit International Public*, no. 1.

[2] The *législation* of a country is a term often used to describe the whole body of its law, whether arising from express legislation or not, but there is always a danger of its being confounded with express legislation, and it is not used to describe the whole body of international law. When a body of law is codified it stands out unmistakably as positive law, clear of the notion of right. And the want in French of a term appropriated to positive law irrespective of the form in which it exists, and at the same time clear of the notion of right, powerfully aids the mistaken view that a body of law cannot be fixed without codification.

do not present facilities for ascertaining the true or positive law equal to those which exist within a state. We will therefore build nothing on a primary right of self-preservation, but inquire what are the limits which, for the better security of states all round, our international society has set to the inviolability of each. Thus we shall learn the actual international rights of self-preservation.

Rights of Self-preservation actually allowed by International Law.

A state may not attack another, threaten to attack another, or make preparations from which an intention to attack another may be reasonably inferred. The same prohibitions extend to the subjects of a state. These indeed can seldom undertake any thing against another state as a whole, although filibustering expeditions directed against weak states are not unknown, but the interference of foreigners is common where a state is divided by faction, and it always bears in law the character of an attack on the state as represented by the government which the interfering persons' own state recognises.

So far as a state attacked or threatened cannot [illegible] measures taken within the physical [illegible] territory and the [illegible] fault; and [illegible] past as well as security [illegible] offence. But it often happens that the [illegible] danger will not admit of the delay which the normal course of action would involve. If within a state it is

a matter of daily necessity that a citizen should repel an actual or avert a threatened attack by his own force, because the police cannot be present everywhere, much more must a corresponding necessity be liable to arise between states, an international police being wholly wanting. In such cases a state may take its defence into its own hands, even to the extent of employing force within the territory of another state, on condition of limiting its abnormal action to what the emergency requires.

Whatever right of action outside the physical limits of its own sovereignty is allowed to a state by these rules may be described as a right of self-preservation. And whatever right of action within the physical limits of its own sovereignty is left to a state by the same rules may be described as the measure of the uses which, internationally, it may make of its independence. Its independence is not itself thereby defeated, because the prohibition against attacking or threatening another state does not place it in a position of dependence on any other state in particular, and the international society is too ill organized for subjection to its rules to be described as dependence on the society at large.

To illustrate these rules two cases may be quoted, one where the right of self-preservation given by them was exercised within foreign territory, the other where the action was taken on board a ship flying a foreign flag on the high seas. The first "happened during the Canadian rebellion of 1838". I use Mr Hall's excellent summary of the facts. "A body of insurgents collected to the number of several hundreds in American territory, and after obtaining small arms and twelve guns by force from American arsenals seized an island

at Niagara within the American frontier, from which shots were fired into Canada, and where preparations were made to cross into British territory by means of a steamer called the Caroline. To prevent the crossing from being effected, the Caroline was boarded by an English force while at her moorings within American waters, and was sent adrift down the falls of Niagara... There was no choice of means, because there was no time for application to the American government; it had already shown itself to be powerless, and a regiment of militia was actually looking on at the moment without attempting to check the measures of the insurgents[1]". The United States complained of the violation of territory, and declared that it lay on England "to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation...also that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it". This was a correct statement of the law, except so far as concerns the emergency's leaving no moment for deliberation, which is an unnecessary condition if the emergency is such that deliberation can only confirm the propriety of the act of self-preservation. But the case was within the substance of the conditions laid down, and the incident was allowed to drop. Mr Hall well remarks that "the government of the United States must have felt that it would have been placed in a position of extreme gravity if the

[1] *Treatise on International Law*, 3rd edn., p. 267.

English authorities had allowed things to take their course, and had then held it responsible for consequences to the production of which long continued negligence on its part would have been largely contributory". The observation points out the advantage which accrues, even to the state of which the territory is violated, from the permission of proper acts of self-preservation. But the threatened attack on Canada by citizens of the United States, for whom their country was responsible, was sufficient, even had there been no negligence on the part of their government, to constitute the fault which, in conjunction with the emergency, justified the act.

The other case is that of the Virginius, a ship belonging to Cuban insurgents but which had obtained a United States register from the proper authority by a fraudulent affidavit. She was captured by the Spaniards on the high seas, while on her way under the American flag to assist an insurrection then on foot in Cuba. Many of those on board, including certain American citizens and some Englishmen who formed part of the crew, were tried by court martial and put to death. The United States asserted that the Virginius had a right to the American character against all the world except themselves, but having regard to the fraud in obtaining their register they accepted her surrender without any salute to their flag by way of reparation for her capture, Spain however undertaking to proceed against the persons who had offended their sovereignty. It does not seem to have been discussed between the two governments whether, even admitting the American character of the Virginius, her capture was not authorised on the ground of self-preservation; and perhaps the distance outside Spanish

territorial waters at which she was taken would have made it difficult to sustain that plea. But I cannot doubt that such a plea may be good in a proper case, for the mischief might be irremediable otherwise, and a ship on the high seas can surely enjoy no greater immunity than national territory itself. Shooting the Americans and Englishmen could not be justified if the Virginius was to be regarded as American, for in that case they had not come within Spanish jurisdiction, whatever offence they may have committed. If the capture of the ship was justifiable, and they had been killed in resisting it, it would have been a different matter and they must have taken their chance; but as soon as they were prisoners they were incapable of further mischief, and the emergency was at an end so far as they were concerned. And although Spanish jurisdiction over persons on board a Spanish ship cannot be denied, the Virginius could scarcely be regarded as a Spanish ship as against any sailors who might have taken service in her without a knowledge of her true ownership, or at least such jurisdiction ought in that case to have been exercised with the greatest moderation. The British government did not complain of the seizure of the Virginius or of the detention of her crew, but said that "it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners". The United States obtained pecuniary reparation for the families of their executed citizens[1].

[1] See Wharton's *Digest of the International Law of the United States*, § 327, and Hall's *Treatise on International Law*, 3rd edn., pp. 271—5.

The rule as it has been here stated requires attack, the threat of attack, or preparations from which an attack may be reasonably inferred, before a right of self-preservation arises. But what if the absence of all these be admitted, and yet a state will manifestly be unable of itself to prevent a hostile use being made of its territory or of its resources? May not the state against which such hostile use is manifestly impending transgress the foreign boundary in order to avert the consequence it foresees? Probably no one will doubt that it may. Suppose two strong powers to be at war, and a weak power bordering on them both to be neutral. And suppose that one of the belligerents has sure information that a corps of the other, quite beyond the ability of the neutral to resist, is on march to obtain a strategic advantage by violating the territory of the latter. It can hardly be said that the belligerent against whom the blow is aimed may not anticipate it on the neutral's territory. Not that even in such a case we ought to admit a right of self-preservation without fault on the part of the state of which the rights are infringed. By that admission we should abandon all jural foothold. But the case really comes within the doctrine laid down, by virtue of the jural principle that every one must be presumed to intend the necessary consequences of his actions. When a state is unable of itself to prevent a hostile use being made of its territory or its resources, it must either be deemed to allow proper measures of self-preservation to be taken by the state against which such a use is manifestly impending, or it must be deemed to intend the hostile use as being the necessary consequence of refusing the permission. This principle covers the seizure of the Danish fleet by England after the treaty of Tilsit in 1807, when there

was irresistible reason for believing that Napoleon and Alexander would have compelled, by force if necessary, its addition to the naval armaments arrayed against them. The act of self-preservation must in this as in all other cases be limited to what is strictly imposed by the emergency, and in the instance cited England offered to Denmark the most solemn pledge that, on the conclusion of a general peace, the fleet of which the surrender was asked should be restored in the same condition and state of equipment as when received.

The Balance of Power.

In order to bring out fully the scope of the above rules it is necessary to draw attention to what they do not include as well as to their affirmative contents. A state has no right to security against mere fear. It has no right to prevent another state's acquiring power of which it can only be said that it may be used to the injury of neighbours, when there is neither an express threat so to use it nor any conduct from which an intention so to use it can be reasonably inferred, and when the power which causes the fear merely results from the growing population and wealth of the state in question. The apprehensions which may be excited by the annexation of territory do not fall within the subject which we are now considering. Every rearrangement of the map of Europe is regarded as of general interest to all the members of the European political system, and any of them may claim to have a voice in it. And on similar principles general opinion in the United States claims a voice in American arrangements beyond the limits of the great republic. But putting the case of territorial aggrandisement aside,

the law may be taken to be that the natural growth of a state in power, and even the increase of its armaments in a fair proportion to its population and wealth and to the interests which it has to defend, gives no special rights of self-preservation to its neighbours so long as an intention to misuse its power cannot be imputed to it on sufficient evidence. The uses of independence can be restricted only for the fault of the state which suffers the restriction, or of those for whom it is answerable as being its subjects.

The place which the doctrine of the balance of power has held in the international relations of European states, and which has been accorded to it by accredited writers on international law, may occasion a doubt whether the law on the subject has always since the Peace of Westphalia been such as it now is. But the legal significance of that doctrine must not be hastily judged. The times are not remote when international practice was so bad that an intention to abuse power might correctly be inferred on slighter evidence than would now be necessary. Again, when international politics were largely the personal and family affairs of monarchs, the combination of the power of two states by marriage, without either state being merged in the other or its frontiers enlarged, presented a question of general interest not altogether out of comparison with that which was presented by a case of territorial aggrandisement. And when the merger of crowns arises by marriage or inheritance, the resulting territorial aggrandisement may be of as serious consequence to the European political system as if it arose from conquest, and it would probably be thought even now that rules suited to the descent of property cannot oust the authority of that system over the rearrange-

ment of its map. It is not meant to justify all the wars which have been waged for maintaining the balance of power, or all the terms in which that balance has been expressed as a principle of international law, but it may well be doubted whether it was ever held that any special right of self-preservation accrued to a state from the internal growth of its neighbour, without the fault of the latter in act or intention.

Alleged right of Self-preservation against the Contagion of Revolution.

While pointing out what the rules concerning self-preservation do not permit, a caution must be given against another doctrine of a more insidious character than any misconception about the right to a balance of power, the doctrine that the government of a state, on its own account or as representing its constitution, has any right of self-preservation against the consequences which may follow from the principles of government asserted in another state, when no attack is made threatened or intended on the state itself or on its internal freedom of action.

The international society to which we belong is not one for the mutual insurance of established governments, though from time to time attempts have been made to work it as such[1]. The most memorable of those attempts is that which during a few years after the Congress of Vienna was made by the pentarchy to rule Europe in accordance with the principle of legitimacy. In the circular despatch which on the occasion of the insurrection at Naples the courts of Austria Russia and Prussia dated from Troppau, 8th December 1820, they said that "the powers have

[1] See above, p. 58.

exercised an incontestable right in occupying themselves with taking in common measures of security against states in which the overthrow of the government by a revolt, even could it be considered only as a dangerous example, must have for its consequence a hostile attitude against all constitutions and legitimate governments. The exercise of that right was still more urgently necessary when those who had placed themselves in that situation sought to extend to their neighbours the misfortune which they had brought on themselves, and to propagate revolt and confusion around them. Such a position and conduct is an evident infraction of the pact which guarantees to all European governments, besides the inviolability of their territory, the enjoyment of peaceable relations excluding all encroachment on the rights of one another".

Lord Castlereagh's answer was dated 19th January 1821. He repudiated the interpretation which converted the treaties between the powers into a pact between their governments, and he refused to connect England with the intervention in Naples on which Austria had decided. But he added: "it should be clearly understood that no government can be more prepared than the British government is to uphold the right of any state or states to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another state. But as they regard the assumption of such right as only to be justified by the strongest necessity, and to be limited and regulated thereby, they cannot admit that this right can receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bear-

ing upon some particular state or states, or be made prospectively the basis of an alliance. They regard its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the circumstances of the special case; but they at the same time consider that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into the ordinary diplomacy of states, or into the institutes of the law of nations[1]".

This language altogether failed to repudiate intervention for self-preservation against the mere contagion of principles. The true ground was taken by Canning on the occasion of the French intervention against the government which had been established by insurrection in Spain. In his despatch of 31st March 1823 to the British ambassador at Paris Canning wrote: "No proof was produced to his majesty's plenipotentiary of the existence of any design on the part of the Spanish government to invade the territory of France, of any attempt to introduce disaffection among her soldiery, or of any project to undermine her political institutions; and so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British government to afford any plea for foreign interference. If the end of the last and the beginning of the present century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation, but because she attempted to propagate first her principles, and afterwards her

[1] *Annual Register*, vol. 62, part 2, p. 738.

dominion, by the sword[1]". The right of intervention in a foreign state, with the motive of self-preservation against the effects of its internal troubles, was here put on its true basis and with its true limits. Those limits have not always been since observed, but at last they are generally admitted.

Self-preservation as a ground of Criminal Jurisdiction.

The independence of a state within its territory appears to carry with it the exclusive authority over the actions of all persons within its territory, the exclusive decision of what they shall be free or not free to do there. This refers to the criminal law, and has little bearing on that civil branch which is called private international law[2]. There we mostly deal with what men do in the exercise of that liberty which is left to them through the absence of interference by the criminal law of the place where they are, as in marrying, contracting, making a will and otherwise; and we deduce the consequences of such acts with reference to the civil laws of the countries which they concern. For example, a marriage is valid everywhere if celebrated in the form required by the law of the place of celebration, and if the parties are capable of contracting it according to the law of the state to which they are subject, or of their domicile, the latter being a point on which there is not as yet a full agreement. Sometimes, even in private international law, the civil consequences have to be considered which flow from a criminal act, as, for

[1] *Annual Register*, vol. 65, p. 141*.

[2] See above, p. 9.

example, where an act is both a crime and a civil wrong giving a right to damages. But what we are here concerned with is only the criminal side of acts, and the independence of a state with regard to its territory would seem to be violated if a foreign power presumed to restrict the liberty of men on its soil by denouncing penalties for acts done there with the license of the local law, even if the enforcement of such penalties was postponed till the persons to be affected by them came within the territorial limits of the foreign authority.

On the other hand, a state is a society of men over whom as well as over its territory its sovereignty extends; the acts of its subjects, wherever done, may affect the population with which they have a continuing tie and among which they are likely to return; and the independence of the state with regard to its subjects would seem to be violated if a foreign power stood in the way of its control over their acts, even though done abroad, when the penalties by which such control was to be made effectual were only to be enforced in their home.

The latter principle is allowed to prevail. Foreigners in a country are subject to two sovereignties, each of which may restrict their liberty by the provisions of its criminal law. They are subject to the local criminal law just as native citizens are, and they are subject to such criminal enactments as the law of their own country may apply to its people abroad, on condition that no attempt is made to enforce the latter until they come within the physical limits of their home sovereignty, its territory and its ships. England has acted on this doctrine by legislation which began as early as the reign of Henry the eighth, and British subjects are

now punishable in the British dominions for many grave offences committed in foreign countries.

But most countries other than England and the United States apply more or less of their criminal legislation not only to the acts of their subjects but also to those of foreigners in foreign countries, always under the condition that its enforcement can only take place within the physical limits of their respective sovereignties. The Institute of International Law adopted at Brussels in 1879 by 19 votes against 7, and reaffirmed at Munich in 1883 by a large majority, a resolution containing a principle on which this may be supported. "Every state has the right to punish acts committed even out of its territory, and by foreigners, in violation of its penal laws, when those acts attack (*constituent une atteinte à*) the social existence of the state in question and endanger its security, and are not provided against by the penal law of the country on the territory of which they have taken place[1]." The principle thus invoked is that of self-preservation, but not as an abstract and absolute right. A right of self-preservation is allowed by the resolution where the penal law of the *locus delicti* does not prohibit the noxious act, but, where such prohibition is forthcoming, the state which is threatened is not allowed to supplement a sanction which it may deem insufficient. I opposed even this moderate resolution, observing that in criminal matters territorial competence and personal competence are justified by the duty of knowing the laws of the country where you act or to which you belong, but that no one is bound to know the laws of a foreign country, yet the doctrine maintained would

[1] *Annuaire de l'Institut du Droit International*, vol. 3, pp. 276—281; vol. 7, pp. 151—157. *Tableau Général*, 1873—1892, p. 100.

impose on writers and speakers the necessity of knowing those of all the countries which their words may have reached and which they may afterwards visit. The peace of the world would be better preserved by resorting to diplomatic redress for attacks made on a state by foreigners abroad, than by legislation of so irritating a character. And Mr Hall has said of the resolution in question that under it "precisely the class of acts remains subject to exceptional jurisdiction which there is most danger in abandoning to it. Probably as between civilised states political acts are the only acts, satisfying the description, which would not be punishable by the law of the state where they are committed. The question presents itself therefore whether self-preservation is really involved to so serious an extent as to override the rights of sovereignty. It would be rash to say that it never is so deeply involved, but it is not rash to say that the occasions are rare, and that it is doubtful whether it would be possible to allow such exceptional crimes to be dealt with without in practice permitting ordinary political acts to be also struck at[1]." But continental legislation takes no account of the condition that the acts to be penal when committed by foreigners abroad shall not be penal in the *locus delicti*. And while in France and several other countries the penality in question is confined to offences against the safety of the state or against its currency, in others it is applied to offences against subjects. Self-preservation seems especially in the last case to be stretched to an unwarrantable extent.

[1] *Treatise on International Law*, 3rd edn., p. 210, note.

CHAPTER IX.

TERRITORIAL SOVEREIGNTY, ESPECIALLY WITH RELATION TO UNCIVILISED REGIONS.

Territorial Sovereignty distinguished from Property.

THE civilised world, and so much of the uncivilised world as nations of the European race have assumed to themselves in sovereignty, is mapped out among them as the territory of one state or another. Each state has a sovereignty in and over its territory which presents some points of resemblance to property in land, but more important points of difference. The resemblance chiefly consists in exclusiveness and in being alienable. A state may exclude other states from doing acts of sovereignty in its territory, as a landed proprietor may exclude other persons from acting as proprietors on his land; and a state may alienate its sovereignty subject to the rules of the society of states, one of which, as we have seen, makes every alteration of the map of Europe a matter of common interest to that quarter of the globe, as a landed proprietor may alienate his property subject to the laws of his country. But property and sovereignty play widely different parts in the system of acts and purposes which makes up civilised life, and sometimes

they are contrasted with one another in circumstances which would make it very inconvenient to say that a state has the property in its territory. For instance, when a state cedes a province it cedes the territorial sovereignty over the whole, and the property in those parts which belonged to it as property, such as fortresses and public buildings, but the property in all other parts remains unaffected. If the state which receives the cession desires to erect a new fortress or enlarge an old one, it must acquire the necessary site from the proprietors by purchase or expropriation according to law. The power of expropriation for public purposes is one of those powers of the state subject to which all property is enjoyed, and which are collectively described as eminent domain; and in this another reason has been found for treating territorial sovereignty as a kind of property. The alienation of territory has been regarded as an exercise of the right of eminent domain, and that right again has been regarded as a reserved portion of the property, so that the alienation of territory would be the exercise of a proprietary right. But objection may be taken to that reasoning. The right of eminent domain as it exists within a state rather limits, and when exercised affects, property, than is a reserved portion of it; but the cession of territory, as we have seen, does not affect any property except what is included in the cession because it happens to belong to the state and is therefore alienated in exercise of the ordinary rights of property[1].

[1] A government may assume the power to cede land to a foreign state in property as well as in sovereignty, taking on itself the burden of expropriating the private owners; and the state receiving the cession would not in that case be bound to enquire whether the government contracting with

Again, the principle of the feudal system by which all land was ultimately held of the crown has a superficial resemblance to eminent domain, but only a superficial one. That all land was ultimately held of the crown gave the latter a right of escheat in default of heirs which was really a reserved part of the property, as much so as the landlord's reversion on a lease; but it never put the crown in a position to exercise those rights of interference with property for public purposes which constitute eminent domain. For those rights a clear thinker must seek another source than tenure, under the feudal system as well as under any other. On every ground then I shall treat territorial sovereignty as distinct from property, and shall avoid describing it as eminent domain.

But besides the notion of tenure, carried up to the king as the ultimate proprietor of whom all others held, feudalism contained—nay, as a practical system was even based on—a confusion between the notions of property and government. It belonged to the lord to govern his manor as it belonged to the king to govern his kingdom, and it belonged to the king to govern his kingdom as it belonged to the lord to govern his manor. The kingdoms and principalities which had this view of things as their principle were the patrimonial kingdoms and principalities of which we read in Grotius and other writers of the sixteenth and seventeenth centuries, when they began to be felt strange. They were the property of their kings or princes, and capable of passing by marriage, bequest or inheritance

it had exceeded its constitutional power, for a government may be accepted internationally as representing not only its state but its subjects and all rights of whatever kind existing in relation to its territory. But this does not alter the effect of a mere cession of territory.

in accordance with the rules of property. Often indeed the notion of a state, dimly perceived even in the middle ages across the prevailing view of things, interposed some limitation of the power of bequest, or some rule for the case of marriage or inheritance not quite the same as for private property; but it was of continual occurrence that the operation of rules of property transferred, united or separated populations without regard to their interests or wishes. There was therefore then no clear distinction between property and territorial sovereignty, and the great geographical discoveries of the period which succeeded the middle ages helped to continue the confusion, because they directed the attention of thinkers to the title by which territory may be acquired in new countries, and so let in the theories about original modes of acquisition in a state of nature, which state, such as it was imagined, hardly admitted a sharp contrast between property and government. In short, as Holtzendorff says, "without the historical and juristic aid of the idea of property, and its application to the territory of a state, it would not have been possible for the old theorists to discover the principle of political sovereignty[1]."

The distinction however was clearly perceived by Grotius, and indeed, whatever obscurity might be thrown over it by the misapplication of Roman speculations about natural modes of acquiring property, it could hardly fail to make its way when Roman law as a practical system, and the Latin language, came to be more accurately studied[2]. *Imperium* is the Latin for

[1] *Handbuch des Völkerrechts*, vol. 2, p. 228.

[2] *Imperium duas solet habere materias sibi subjacentes, primariam personas,.....et secundariam locum qui territorium dicitur. Quanquam*

sovereignty, expressing primarily an authority over persons, but extended to the relation which a state bears to its territory, so that, when international law is discussed in Latin, it is the proper word for sovereignty in both its aspects. The Latin for property is *dominium*, whether a piece of land belongs to a private person or, as in the case of a fortress, to the state in the character of property. And eminent domain, *dominium eminens*, as it exists within a state, is a result of sovereignty, so that there would be an inversion of the true order if we explained the latter, with its accompanying power of alienation, by reference to the former. It may safely be said that the confusion between territorial sovereignty and property is not now made by any one in substance, and it is fast disappearing even from the language of international law, though we may sometimes remark a regrettable persistence in ancient modes of speaking and reasoning[1].

autem uno actu quæri solent imperium et dominium, sunt tamen distincta: ideoque dominium non in cives tantum sed et in extraneos transit, manente penes quem fuit imperio. Grotius, *De Jure Belli ac Pacis*, l. 2, c. 3, § 4. The *quanquam uno actu quæri solent* refers to acquisition in new countries by the so-called natural modes.

[1] Besides von Holtzendorff, Pasquale Fiore rejects the expression "right of international property:" *Trattato di Diritto Internazionale Pubblico*, 3rd ed., § 863, vol. 2, p. 109. Professor Guido Fusinato writes: "The introduction into public law, for territorial cessions, of the methods and considerations of private law, in the forms too which are usual in private law for declaring the will of a party, was intelligible in former times when the idea of the patrimonial state prevailed, and public law was confounded with private, sovereignty with property." Article *Annessione* in the *Enciclopedia Giuridica*, note on p. 6 of the separate print. Professor F. de Martens writes: "It is to the territorial sovereignty that belongs the exclusive rule in all the extent of its possessions. Placing one's self at that point of view, and considering only the international situation of the state, one may say that it is the owner of its territory. In fact it alone can dispose of it, and it does not admit the interference of other powers. As to the private properties situate within its limits, it

The Title to Territorial Sovereignty.

Let us consider the old civilised world, including not only the international society of European origin but those Asiatic and other countries which we have noticed as possessing different civilisations from ours[1]. All the states in it hold their territory by the same kind of title by which their subjects hold their property in land, that is by a series of human dealings—as cession or conquest in the one case, conveyance *inter vivos* or will in the other—deduced from a root assumed as presenting an irreducible situation of fact. But that situation was itself a local distribution of territory or property, of the same nature as the one which results for the present time from the deduction of title. You have got no nearer to an origin of territorial sovereignty or of property. You may discuss the origin of either by way of philosophical or prehistorical speculation, but with no relevancy to international or to national law. You may discuss the motives for maintaining either, with some relevancy to international or national legislation, but with no other relevancy to law. Thus, the title to territorial sovereignty in old countries not being capable of discussion apart from the several dealings, as cession or conquest, which transfer it, we must turn to new countries.

When a new country is formed by a civilised state into a colony, the title to land in it may sometimes be deduced by the proprietors from a situation of fact which existed before the civilised government was

exercises with regard to them all public rights, that is to say the supreme right to protect them and dispose of them, but they no way belong to it according to the principles of private law (*dominium*)." *Traité de Droit International*, translated from Russian into French by Léo, vol. I. p. 452.

[1] See above, p. 102.

established, and which that government has accepted and clothed with its sanction. This will be the case where the colony was formed among natives of some advancement, or where its formation was preceded by the settlement of pioneers of civilisation. But in general the title to land in a colony is traced from a grant by the state, and the authority of the state to make the grant resulted from its territorial sovereignty. Or you may say if you please that, at the moment of acquiring the sovereignty, the state assumed to itself the property in so much of the land as it was not morally compelled to acknowledge as belonging to natives or to the pioneers, and that subsequent grants by the state were carved out of the property so assumed. Either way you carry back the property granted to an origin in sovereignty, but the origin of the latter is still to be considered.

But here again all that can really be considered is the extension of territorial sovereignty over new areas. In other words, the question is what facts are necessary and sufficient in order that an uncivilised region may be internationally recognised as appropriated in sovereignty to a particular state? Whatever the answer may be, the international institutions of the old civilised world cannot have arisen in exactly the same manner, for the appropriation with which we are dealing supposes that territorial sovereignty is already known. The states of the old world may have arisen from the settlement of wandering tribes in regions only occupied, if at all, by tribes on a still lower plane of advancement, and that mode of origin would present great similarity to the extension of an existing state over a new locality. Or the states of the old world may have arisen quite differently. In any case the truth will bear repetition

that, whatever light philology or archæology may throw on the early history of mankind, an impassable barrier separates their researches, in spite of the great interest that must be felt in them, from the subjects with which international law has to do.

The form which has been given to the question, namely *what facts are necessary and sufficient in order that an uncivilised region may be internationally appropriated in sovereignty to a particular state?* implies that it is only the recognition of such sovereignty by the members of the international society which concerns us, that of uncivilised natives international law takes no account. This is true, and it does not mean that all rights are denied to such natives, but that the appreciation of their rights is left to the conscience of the state within whose recognised territorial sovereignty they are comprised, the rules of the international society existing only for the purpose of regulating the mutual conduct of its members. Seen from that point of view the proposition, which at first is startling, becomes almost axiomatic. A strongly organised society may enact rules for the protection of those who are not its members, as is seen in the case of a state which legislates for the protection of foreigners, or against cruelty to animals. But this is scarcely possible for a society so weakly organised as the international one, in which, for want of a central power, the enforcement of rules must be left in the main to the mutual action of the members as independent states. In such a society rules intended for the benefit of outsiders would either fall into desuetude and oblivion, or be made pretexts for the more specious promotion of selfish interests. The subject, however, must be treated at greater length.

The Position of Uncivilised Natives with regard to International Law.

No theorist on law who is pleased to imagine a state of nature independent of human institutions can introduce into his picture a difference between civilised and uncivilised man, because it is just in the presence or absence of certain institutions, or in their greater or less perfection, that that difference consists for the lawyer. But in the early times of international law, when the appropriation of a newly discovered region was referred to the principles which were held to govern the so-called natural modes of acquisition, the occupation by uncivilised tribes of a tract, of which according to our habits a small part ought to have sufficed for them, was not felt to interpose a serious obstacle to the right of the first civilised occupant. The region was scarcely distinguished from a *res nullius*. When again men like Victoria, Soto and Covarruvias maintained the cause of the American and African natives against the kings and peoples of Spain and Portugal, they were not so much impugning the title of their country as trying to influence its conduct, they were the worthy predecessors of those who now make among us the honourable claim to be "friends of the aborigines." Then and now such men occupy a field to which international law may be said to invite them by keeping itself within its own limits. Even those who, in accordance with the modern tendency, make rights instead of law their starting point, can hardly avoid admitting that the rights which are common to civilised and uncivilised humanity are not among those which it is the special function of international right to

develop and protect[1]. But when the African conference of Berlin was laying down the rules for the appropriation of territory on the coasts of that continent, Mr Kasson, the plenipotentiary of the United States, expressed himself thus:

"Whilst approving the two paragraphs of this declaration as a first step, well directed though short, it is my duty to add two observations to the protocol.

"(1) Modern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle my government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression. (2) I have no doubt as to the conference being agreed in regard to the signification of the preamble. It only points out the minimum of the conditions which must necessarily be fulfilled in order that the recognition of an occupation may be demanded. It is always possible that an occupation may be rendered effective by acts of violence which are foreign to the principles of justice, as well as to national and even international law. Consequently it should be well understood that it is reserved for the respective signatory powers to determine all the other conditions from the point of view of right as well as of fact which must be fulfilled before an occupation can be recognised as valid[2]."

Herr Busch, German under-secretary of state for foreign affairs, was presiding, and

"remarked that the first portion of the declaration of Mr Kasson touched on delicate questions, upon which the conference hesitated to express an opinion. It would suffice to reproduce in the protocol the views put forward by the plenipotentiary of the United States of America. The second portion of the declaration of Mr Kasson reverted to the explanations exchanged in the commission, from which it resulted that, in the unanimous opinion of the plenipotentiaries, the declaration drawn up by the conference did not limit the right which the powers possessed of causing the recognition of the occupations which might be notified to

[1] See above, pp. 112, 113.

[2] Protocol of 31st January, 1885. Parliamentary Paper c. 4361, p. 209. The two paragraphs referred to by Mr Kasson are those which form Arts. 34 and 35 of the General Act.

them to be preceded by such an examination as they might consider necessary."

No more was said on the subject, and the result is that when an accession of territory on the coast of Africa is notified to the powers they will have the opportunity of objecting. It cannot be doubted that if the aggrandisement was made at the expense of a civilised population without its consent, or was attended with proceedings of great inhumanity to an uncivilised population, this would be a good ground of objection on the part of any power that pleased to take up the cause[1]. But it would be going much further, and to a length to which the conference declined to go, if we were to say that, except in the case of unprovoked aggression justifying conquest, an uncivilised population has rights which make its free consent necessary to the establishment over it of a government possessing international validity. Any such principle, had it been adopted, would have tended to defeat one of the chief objects of the conference, namely to avoid collisions between its members by regulating more clearly their mutual position on the African coast. For on that system a power might have fulfilled the conditions of notification and establishment of authority which the conference laid down as necessary for making a new acquisition, but it would have still been exposed to see the validity of its acquisition disputed by another power, under the sanction of the conference itself, on the ground of some native title which it might be pretended had not been duly ceded to it. Is any territorial cession permitted by the ideas of the tribe? What is the authority—chief, elders, body of fighting men—if there is one,

[1] See what has been said above, p. 79, no. 5: "the want of a rule to define the action allowable does not exclude all action."

which those ideas point out as empowered to make the cession? With what formalities do they require it to be made, if they allow it to be made at all? These questions are too obscure among uncivilised populations, or, if they are clear to them, too obscure for the whites who are in contact with them, for the latter to find much difficulty in picking a hole, when desired, in a cession alleged to have been made by a tribe. And then there would be the controversies whether the irregular violence to which savages are prone amounted to aggression justifying conquest. All these are questions for which, in the general interest, the civilised powers do well not to give occasion in their mutual arrangements, so long as they are unprovided with the means of deciding them in the particular cases which may arise. Those arrangements are not to be construed as denying, because they do not affirm them, the rights of any who are not stipulating parties to the conventions by which they are made. The moral rights of all outside the international society against the several members of that society remain intact, though they have not and scarcely could have been converted into legal rights. Becoming subjects of the power which possesses the international title to the country in which they live, natives have on their governors more than the common claim of the governed, they have the claim of the ignorant and helpless on the enlightened and strong; and that claim is the more likely to receive justice, the freer is the position of the governors from insecurity and vexation.

Government the International Test of Civilisation.

Civilisation is a term which has often occurred during the last few pages, and we must try to give ourselves an account of what for the present purpose we mean by it. We have nothing here to do with the mental or moral characters which distinguish the civilised from the uncivilised individual, nor even with the domestic or social habits, taking social in a narrow sense, which a traveller may remark. When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilisation and the want of it. If even the natives could furnish such a government after the manner of the Asiatic empires, that would be sufficient. Those empires are formed of populations leading complex lives of their own, so far differing from that of Europe in important particulars, as in the family relations or in the criminal law and its administration, that it is necessary to allow to Europeans among them a system more or less separate under their consuls; but whatever may be the influence which the foreign powers derive from the

force which they are known to possess though they do not habitually exercise it, it is the local force of the empire which on all ordinary occasions maintains order and protects each class of inhabitants in the enjoyment of the legal system allowed it. Wherever a population furnishes such a government as this, the law of our own international society has to take account of it. The states which are members of our international society conclude treaties with it as to the special position to be allowed to their subjects in its territory, as to custom duties and the regulation of trade, as to postal and other administrative arrangements. When at war with it, they observe the laws of war as among themselves, and expect those laws to be observed by it towards them; and they make peace with it by treaties as among themselves. And, what is more particularly to the purpose of the present chapter, they regard its territory as held by a title of the same kind as that by which their own is held, so that the territorial sovereignty of the government in question is a root from which title may be derived to themselves by conquest or cession, and which excludes all modes of acquiring it, whether by discovery occupation or otherwise, which are or pretend to be original modes going back to the inception of sovereignty[1]. But wherever the native inhabitants can furnish no government capable of fulfilling the purposes fulfilled by the Asiatic empires, which is the case of most of the populations with whom Europeans have come into contact in America and Africa, the first necessity is that a government should be furnished. The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy,

[1] See above, p. 82, no. 12, and p. 102.

curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly international law has to treat such natives as uncivilised. It regulates, for the mutual benefit of civilised states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which the sovereignty is awarded, rather than sanction their interest being made an excuse the more for war between civilised claimants, devastating the region and the cause of suffering to the natives themselves.

Treaties with Uncivilised Tribes.

Let us suppose that the officers or private subjects of a European state, or of one of European origin, advance into a region where they find no native government capable of controlling white men or under which white civilisation can exist, and where also no state has yet acquired the sovereignty under the rules which are internationally recognised between white men. We find that one of their first proceedings is to conclude treaties with such chiefs or other authorities as they can discover: and very properly, for no men are so savage as to be incapable of coming to some understanding with other men, and wherever contact has been established between men, some understanding, however incomplete it may be, is a better basis for their mutual relations than force. But what is the scope which it is reasonably possible to give to treaties

in such a case, and what the effect which may be reasonably attributed to them?

We have seen that natives in the rudimentary condition supposed take no rights under international law, but that even the fulfilment of the conditions laid down by Art. 34 of the Final Act of Berlin does not preclude the possibility that objection may be made to an appropriation of territory which one civilised state notifies to another. Hence it follows that no document in which such natives are made to cede the sovereignty over any territory can be exhibited as an international title, although an arrangement with them, giving evidence that they have been treated with humanity and consideration, may be valuable as obviating possible objections to what would otherwise be a good international title to sovereignty. And this is reasonable. A stream cannot rise higher than its source, and the right to establish the full system of civilised government, which in these cases is the essence of sovereignty, cannot be based on the consent of those who at the utmost know but a few of the needs which such a government is intended to meet.

Uncivilised tribes partake in various degrees of those elements out of which the full system of civilised society is built up. Settled agricultural populations know property in land, either as belonging to individuals or to families, or, if as belonging in full measure only to the tribe, at least with such rights of a proprietary nature vested in individuals or in families as are necessary for cultivation. Hunting and nomad tribes may have so slight a connection with any land in particular as to share but little, if at all, the ideas which we connect with property in the soil. Both classes may possess, and a settled population can scarcely fail to

possess, the practice of trade, by way of barter if not for money, to such an extent as to be familiar with its regulation by the authority which they recognise. To whatever point natives may have advanced, the principle must hold that a cession by them, made in accordance with their ruling customs, may confer a moral title to such property or power as they understand while they cede it, but that no form of cession by them can confer any title to what they do not understand. Hence, while the sovereignty of a European state over an uncivilised region must find its justification, as it easily will, not in treaties with natives but in the nature of the case and compliance with conditions recognised by the civilised world, it is possible that a right of property may be derived from treaties with natives, and this even before any European sovereignty has begun to exist over the spot. In that case the state which afterwards becomes sovereign will be bound to respect such right and give effect to it by its legislation, morally bound if only its own subjects are concerned, but if the previous right of property existed in a subject of another state, there can be no doubt but that respect to it would constitute an international claim as legally valid as any claim between states can be. On the coasts of Africa it would fall within "the obligation to insure the establishment of authority sufficient to protect existing rights," which is recognised in Art. 35 of the Final Act of Berlin.

The principles which I have here sought to lay down have been expressed by the Portuguese statesman J. B. de Martens Ferrão, in a passage which I am the more glad to quote because in their application, and on some further points, England and Portugal have differed.

"It is clear," he writes, "that in savage tribes as Lubbock describes them we must recognise all natural rights. Natural rights are born with man; they constitute his personality, which the want of cultivation does not extinguish. But international rights cannot be recognised in those tribes, for want of the capacity for government (*capacité dirigeante*). Being nomads or nearly such, they have no international character. For the same reason they have no constituted sovereignty, that being no doubt a political right derived from civilisation, and therefore having civilisation as its base and the condition of its existence. Modern international law is a result of civilisation. On this ground I do not consider successive cessions of sovereignty, made by native chiefs, half or wholly savage, to the chance comer who gives them the most, without any valid sanction of right, as a reasonable base, sufficient to affect rights founded on the facts just mentioned. And all the less can I so consider them because civil property is not their subject, but is left by the negotiators to the possessor of it if there be one. Such cessions of sovereignty can furnish no juridical argument to oppose to the facts which were recognised as lawful titles by the public law in force at the time in question[1]."

These principles again do not differ from those on which the European states dealt with the native inhabitants of the American continent north of Mexico, although their enunciation in that connection has often been less clear than it can now be made, partly because of the old confusion between territorial sovereignty and property, and partly because the natives concerned were hunters and only to a limited extent cultivators, not possessing so well developed a notion of property in the soil as is possessed by the settled populations of Africa. With Mexico and Peru we have nothing here to do. Those countries had attained a degree of advancement ranking them rather as states than as uncivilised tribes. The history and methods of the British conquest in the more northern parts of the continent were well described by Chief Justice Marshall,

[1] *L'Afrique: la question soulevée dernièrement entre l'Angleterre et le Portugal considérée au point de vue du droit international*, par J. B. de Martens Ferrão: Lisbonne, 1890, p. 6. The passage is on p. 10 of the pamphlet as issued, without the author's name, from a press at Rome.

in delivering the opinion of the Supreme Court of the United States in the case of *Johnson v. McIntosh* in the year 1823[1]. He observes that

"The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilisation and Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others all assented. Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. In the establishment of these relations the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it[2]."

It will be observed that while the Indians passed under political subjection without its being deemed necessary to ask their consent, the right in the soil which they were held to preserve is described as that of occupants, and occupancy is the term used for it in this and all other judgments of the Supreme Court which deal with the question. That it was not a

[1] 8 Wheaton's Supreme Court Reports (21 U. S.), p. 543.

[2] Ib., pp. 573, 574.

greater right was not due to any incompatibility between a greater civil right of property and political subjection, but to the fact that the Indian hunters knew no greater right among themselves. Such as it was, they could admit a white individual to it, but could not expand it into full property, even in his favour.

"Admitting," says Chief Justice Marshall, "their power to change their laws or usages so far as to allow an individual to separate a portion of their lands from the common stock and hold it in severalty, still it is a part of their territory and is held under them by a title dependent on their laws. The grant derives its efficacy from their will, and if they choose to resume it and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians within their territory incorporates himself with them so far as respects the property purchased, holds their title under their protection and subject to their laws[1]."

The Indian occupancy, though in them and their grantees it cannot rise higher, is yet so firmly vested in them that even the United States cannot extinguish it otherwise than by a treaty with them. But when the tribe surrenders it by such a treaty, whatever share they may have carved out of it even for a white is surrendered also, unless the Indians reserve or regrant his rights under the sanction of the commissioners with whom the treaty is negotiated. In the absence of such a reservation or regrant it is presumed that any conveyance which the tribe may appear to have previously made to him, and under which he, even though a citizen of the United States, may afterwards claim, was considered by the Indians as invalid[2]. But grants by the British crown passed the full property, and even when they were made before the Indian right of oc-

[1] 8 Wheaton's Supreme Court Reports (21 U. S.), p. 593.
[2] Ib., pp. 593, 4, 7, 8.

cupancy had been extinguished by treaty, they passed the property subject to that right[1].

We have here a clear apprehension of the principle that an uncivilised tribe can grant by treaty such rights as it understands and exercises, but nothing more. On the practical aspect of the case as affecting the Indians within the territory of the United States it may be remarked that, although they are precluded from converting their right of occupancy into one of property by their own power, whatever aptitude they may show for imitating the civilisation which is closing in on them, yet tribes which show such an aptitude have been admitted as citizens, not to mention the facilities given for individual Indians to be naturalised as citizens in proper cases. It may also be remarked that the Act of Congress of 3rd March 1871[2], which transfers the relations with the Indians from the treaty-making to the legislative power of the United States, is by no means inconsistent with a practical observance of the principle that their right of occupancy cannot be extinguished without their free consent. But it would be beside our purpose to enquire into the conduct of Indian affairs either by the United States or by the British government, or even whether the original assumption that the redskins were only hunters, incapable of a larger right than one of occupation, was justified in the case of all the tribes.

In Africa, notwithstanding the caution with which Mr Kasson's ideas were received at the conference of

[1] 8 Wheaton's Supreme Court Reports (21 U. S.), pp. 579, 596. "The soil" is an expression often used in this case for the property, as distinguished from the Indian occupancy on the one hand, and from the sovereignty, often called the jurisdiction or the dominion, on the other hand.

[2] Revised Statutes, § 2079.

Berlin, an importance has sometimes been attached to treaties with uncivilised tribes, and a development has sometimes been given to them, which are more calculated to excite laughter than argument. A turn so different from that which things have taken in America is due to several causes. First, the uncivilised populations of Africa are mostly settled agriculturists or cattle-breeders, in a stage of advancement higher than that of the redskins, though still short of that which would relieve the white races, on their arrival among them, from the duty of furnishing a government. Secondly, the climate being less suitable for European settlement, the populations in question long continued to be less known, and hence it was possible, as in the case of Monomotapa, to exploit their names by vaunting as empires, comparable to those of Asia, what were certainly nothing more than transient agglomerations effected by savage Napoleons. Thirdly, the adventurers—I use the term in no derogatory sense—who in recent times have led the way to the partition of Africa, have had a sufficient tincture of the forms and language of international law to hope for an advantage over European competitors through what have really been travesties of them. Lastly, it may be trusted that some part has been played by a real desire to respect the just, though not well understood, claims of the natives. I am not aware of any national bias in expressing these opinions. During the recent discussions between England and Portugal, if the latter built unsoundly on cessions by the "emperor" of Monomotapa in 1607 and 1629, the former built with as little reason on a treaty by which Lobengula, in 1888, accepted British protection for a region over which he and his father and his people had never been any thing but

cruel raiders. If the antiquity of the Portuguese treaties exposed them to the answer that, whatever they had been in the beginning, they had lapsed into desuetude at least for the larger part of the territory alleged to be comprised in them, it was all the more difficult to treat the British one seriously, just because the facts relating to what it comprised were so modern and transparent. Leaving instances which have contributed to international dissension rather than to enlightenment, the present section may be brought to a close by two instructive examples of what a treaty with an uncivilised chief should and should not be.

A treaty which exemplifies what one with natives ought not to be is that which Mr Colquhoun, as "representative of the British South Africa Company," concluded on 14th September 1890 with Umtasa or Mutassa, dignified as "king or chief of Manika." In the "kingdom" of this savage, for so he may be described without disrespect to the much more advanced though still uncivilised natives found elsewhere in Africa, who was such a drunkard as to be subject to *delirium tremens*, adventurers had been prospecting for gold under a Portuguese title; and Mr Colquhoun, on 21st September, thus described his behaviour in the circumstances. "With regard to the result of the mining, Umtasa says he has till now been 'sitting watching'; while the Portuguese have ignored Umtasa, the latter on his part has ignored the presence of the white men in his country[1]." And during the events of this and the following months, which saw the English and the Portuguese forces alternately at his kraal, fearing only for his skin, he pursued the policy of granting every demand of those who were present, and

[1] Parliamentary Paper c. 6495, p. 26.

excusing himself, or even denying what he had done, to those who were absent. Such a pattern adept in all the branches of civilised administration was made to grant to the company:

"The sole absolute and entire perpetual right and power to do the following acts over the whole or any portion of the territory of the said [his] nation or any future extension thereof, including all subject and dependent territories.

(*a*) To search, prospect, exploit, dig for and keep all metals and minerals.

(*b*) To construct, improve, equip, work, manage and control public works and conveniences of all kinds, including railways and tramways, docks, harbours, roads, bridges, piers, wharves, canals, reservoirs, waterworks, embankments, viaducts, irrigations, reclamation, improvement, sewage, drainage, sanitary water, gas electric or any other mode of light, telephonic and telegraphic power supply, and all other works and conveniences of general or public utility.

(*c*) To carry on the business of miners, quarry owners, metallurgists, mechanical engineers, ironfounders, builders and contractors, shipowners, shipbuilders, brickmakers, warehousemen, merchants, importers, exporters; and to buy, sell and deal in goods or property of all kinds.

(*d*) To carry on the business of banking in all branches.

(*e*) To buy, sell, refine, manipulate, mint and deal in bullion, specie, coin and precious metals.

(*f*) To manufacture and import arms and ammunition of all kinds.

(*g*) To do all such things as are incidental or conducive to the exercise, attainment or protection of all or any of the rights, powers and concessions hereby granted[1]."

And the company agreed:

"That it will, under the King's supervision and authority, aid and assist in the establishment and propagation of the Christian religion and the education and civilisation of the native subjects of the King, by the establishment, maintenance and endowment of such churches, schools and trading stations as may be from time to time mutually agreed upon by the King and the Resident hereinbefore mentioned, and by the extension and equipment of telegraphs and of regular services of postal and transport communications[1]."

It would be superfluous to quote the political stipulations which the treaty also contained. Taken alone they might not have been beyond Umtasa's under-

[1] Parliamentary Paper c. 6495, p. 28.

standing, but when they were mixed with a farrago which must have been mere jargon to him, the whole must be dismissed as something which could not have received his intelligent consent.

It is pleasant to be able to quote an example to be followed from a British source also. On 26th September 1889 the following treaty was signed with Mr Buchanan, "Her Majesty's acting Consul for Nyassa," by the chiefs of a nation which for intelligence and character ranks very high among those which must still be called uncivilised.

"We the undersigned Makololo chiefs (sons of the late Chiputula) do, in the presence of headmen and people assembled at this place, hereby promise:

1. That there shall be peace between the subjects of the queen of England and our subjects.

2. That British subjects shall have free access to all parts of our territory (country), and shall have the right to build houses and possess property according to the laws in force in this country; that they shall have full liberty to carry on such trade or manufacture as may be approved by Her Majesty; and should any difference arise between the aforesaid British subjects and us the said Makololo chiefs, as to the duties or customs to be paid to us the said Makololo chiefs or the headmen of the towns in our country by such British subjects, or as to any other matter, that the dispute shall be referred to a duly authorised representative of Her Majesty, whose decision in the matter shall be binding and final.

3. That we the said Makololo chiefs will at no time whatever cede any of our territory to any other power, or enter into any agreement treaty or arrangement with any foreign government except through and with the consent of the government of Her Majesty the queen of England, &c.[1]."

Here we observe that there is nothing beyond the comprehension of the Makololo chiefs; that there is no cession of territorial sovereignty by them, or any

[1] Parliamentary Paper c. 5904, p. 156. The final "&c." is so given in the paper, but the matter it covers was probably only ceremonial. On p. 155 is a similar treaty entered into by Mlauli with Mr Buchanan, and the form was probably supplied by authority as a common one to be used.

pretence of founding on their consent the right which the queen may one day come to exercise of founding a regular government in their country in the character of territorial sovereign, such right being tacitly left to be developed in the progress of events, and in accordance with the rules of international law as between Her Majesty and other European powers; that in the mean time the Makololo are recognised as a nation under their chiefs, capable of entering as such into relations with the queen's government in matters within their comprehension, and acknowledging the final supremacy of the queen's government in such matters, the same government having immediate authority over the white settlers in matters belonging specially to civilisation, as trade and manufacture; that property in land is recognised as among the matters within the comprehension of the chiefs and people, so that white settlers may acquire title to it under native law; and that the exclusion of other powers is stipulated, so far as such exclusion may depend on the Makololo. Every foundation is therefore laid, to the extent admitted by the nature of the case, for the future development of territorial sovereignty in the civilised and international sense, and for the permanence under it of such rights as the Makololo already possessed. To use an expression employed in the United States Supreme Court for the position of the Red Indians, the Makololo are admitted as a "domestic dependent nation[1]," but, as

[1] See *Cherokee Nation v. State of Georgia*, decided in 1831, 5 Peters's Supreme Court Reports (30 U. S.), p. 1: Chief Justice Marshall said, p. 17, that "they [the Indians] may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a

became their condition, with rights beyond that of mere occupancy allowed in the territory of the United States to the tribes of hunters.

Discovery and Occupation as International Titles.

The position of uncivilised natives having now been fully discussed, the ground is clear for a discussion of the titles to territorial sovereignty in uncivilised regions which states belonging to the society of international law invoke against one another.

Discovery and occupation or settlement have often been opposed to one another as rival titles, discovery being regarded with more favour by the old law of nations and especially forming the base of the Spanish and Portuguese claims, while experience and good sense led to greater stress being laid on occupation or settlement, which thus formed the base of the claims maintained in more recent times. It cannot be denied that there is some truth in this contrast, although it does not present itself in history with quite such sharp lines. That original discovery not followed by any act of possession should create a right for all time, would be too bold an assertion for a practical diplomat to think of formulating it. He would naturally seek to fortify his position by drawing every possible advantage from any occupation of the region in dispute, however illusory, which he could claim that his country had enjoyed. On the other hand, that a state should try by a hasty occupation to anticipate another state in reaping the fruit of its discoveries would be so unfriendly a proceeding that a diplomat, even while in

state of pupilage. Their relation to the United States resembles that of a ward to his guardian."

the main resting his case on occupation, would not fail to put forward every plausible claim of discovery which he might be able to make on his side. Yet, if we take a general view of the international controversies on the subject, we shall find that certain doctrinal lines correspond more or less accurately to the conditions of certain nations and certain periods. It is here as in many philosophical controversies. At first sight there appear to be irreconcilable theses. A nearer examination discloses a remarkable agreement among the greatest minds. But the third and last review shows that after all there are differences[1].

The titles which Portugal and Spain first claimed over the eastern and western worlds were not founded on discovery, but on papal grants. In 1454 pope Nicholas V granted Guinea to king Alfonso V of Portugal, and in 1493 pope Alexander VI granted to Ferdinand and Isabella, and to their successors kings of Castile and Leon, all lands situate further west than a line drawn from north to south a hundred leagues west of the Azores. In 1494 the sovereigns of Spain and Portugal modified their boundary by the treaty of Tordesillas, extending the right of Portugal to a line drawn 370 leagues west of the Cape Verde Islands;

[1] It has been objected to English writers on our subject that they argue too much from practical considerations, and show a weakness in principle which again is attributed to a want of systematic study of the literary sources of law, especially the Roman law. If however there is principle in considering how men would settle the proportional weight that would be given to discovery and to occupation in a supposed state of nature to which the international society is assimilated, and then laying down that, because of that assimilation, the members of the international society must accept the law of nature so arrived at, it may be thought that there is as much principle and more certainty in going direct to the way in which nations have settled for themselves the proportional weight to be given to discovery and to occupation.

and in 1506 pope Julius II confirmed that treaty. But the title so obtained could not be successfully pleaded against protestant states, and when Mendoza, Philip II's ambassador, complained of the expedition of Drake, he based his claim on discovery, to which Elizabeth replied that

"as she did not acknowledge the Spaniards to have any title by donation of the bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for that their having touched only here and there upon a coast, and given names to a few rivers or capes, were such insignificant things as could in no ways entitle them to a propriety further than in the parts where they actually settled and continued to inhabit[1]."

Evidently a controversy of this kind could not be long maintained on the ground of abstract and contradictory principles, neither of which could be entirely ignored by those who invoked the other. So both theoretical writers and official documents, so far as they are concerned with the title which civilised powers may claim to the sovereignty over savage countries, generally try to blend discovery with possession or occupation and not to determine clearly the several parts which belong to them. Vattel for instance writes as follows:

"Thus navigators, being on voyages of discovery with commissions from their sovereigns, and meeting with islands or other desert countries, have taken possession of them in the names of their nations; and that title has generally been respected if it has been closely followed by a real possession[2]."

Similarly, in the declaration of 4th June 1790 signed by the Count de Florida Blanca and sent to all the courts of Europe during the Nootka Sound controversy, the king of Spain limited his claim in the

[1] Camden's Annals, year 1580. Translated as in Twiss, *Oregon Question*, p. 161.

[2] Book 1, chap. 18, § 207.

Pacific to "the continent islands and seas which belong to His Majesty, so far as discoveries have been made and secured to him by treaties and immemorial possession, and uniformly acquiesced in, notwithstanding some infringements by individuals who have been punished upon knowledge of their offences[1]."

In the application of this doctrine to particular cases, it is natural that the element of discovery which it contains should have been oftener appealed to by the Spaniards and Portuguese, whose energies were so rapidly enfeebled that they failed to occupy the vast regions which they had been the first to discover, and that the element of possession should have been oftener appealed to by the English and the other nations which entered on the field later. But there is no state which has not insisted in its turn on that part of the doctrine which best suited its convenience at the moment, or which has maintained a perfectly uniform attitude on the questions of detail into which the general doctrine resolves itself.

In considering those questions of detail I shall admit that discovery can only confer what has been called an inchoate title, to be completed by occupation within a reasonable time. But I shall also admit that it confers such an inchoate title by no virtue proper to discovery, but because another state, if it seized on the newly discovered country too soon, would be guilty of a proceeding so unfriendly that international rules are justified in regarding it as an act of hostility. Also we cannot help being struck by the fact that titles having their source as well as their completion in occupation or possession, which for a considerable time past must

[1] Twiss, *The Oregon Question Examined*, pp. 109, 163.

have been the case of those in Africa, now the chief field for the application of the doctrine, present much resemblance to those having their source in discovery, as was the case with the older titles both in that continent and in America. For occupation as well as discovery has its duties, which must be fulfilled before a solid title can result from it, and which can seldom be completely fulfilled at the moment at which occupation begins. Those duties consist in establishing in the country occupied an authority which may protect the natives with whom contact has become inevitable, and under which the civil rights essential to European or American life can be enjoyed in tranquillity. This is in effect what Art. 35 of the general act of the conference of Berlin lays down for the coasts of Africa[1]. Accordingly the sufficiency of the occupation must be measured by the fulfilment of the obligation attaching to it. If a state claiming sovereignty by occupation should fail to establish the necessary authority, no other state can be bound to overlook the injury that may be thereby caused to its own subjects penetrating into the country, or the inhumanity to the natives which must inevitably result. But occupation commonly begins through private enterprise, recognised and supported by the state to which the adventurers belong, but not organised in the form of an expedition sent by the state itself, so that the development of public authority in the occupied region can only be gradual. Therefore the title which originates in occu-

[1] "The signatory powers of the present act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon."

pation will usually, like that which originates in discovery, present an interval during which the fulfilment of the conditions for the ultimate acquisition of sovereignty will be more or less in suspense. But for the close analogy thus arising between the two titles, there would be little use in dwelling on the questions relating to discovery, now that the world has been so fully discovered.

The Inchoate Title by Discovery or Occupation.

The first of the questions of detail which have been alluded to is *under what conditions did discovery formerly, or does a commencement of occupation now, confer an inchoate title to territorial sovereignty—that is, the right of occupying or completing the occupation within a reasonable time, and of subjecting or expelling the settlements which other civilised powers or their subjects may have made in the interval?* The most important condition is that the state claiming the inchoate title shall make known its intention of deriving the full benefit from the discovery made or occupation commenced by itself or its subjects, or at least that there shall be no reasonable doubt about the intention in the circumstances. Were this not the case, another state or its subjects might enter the country under a reasonable belief that it had not been appropriated by a foreign power, and might justifiably complain if an inchoate title claiming precedence over theirs was afterwards sprung on them. Accordingly it has always been usual for the state which intends to claim an inchoate title to make its intention known from the beginning. "In newly discovered countries," Lord

Stowell said, "where a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact[1]." Here notification is to be understood in the general sense of making known, and not in the special sense of an express communication to other powers, in which it is used in Art. 34 of the general act of the Conference of Berlin:

"Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as the power which assumes a protectorate there, shall accompany the respective act with a notification thereof addressed to the other signatory powers of the present act, in order to enable them if need be to make good any claims of their own."

What has been deemed sufficient to make known the intention of appropriating the sovereignty has naturally varied with the circumstances of different times. It never was thought that a discovery might be kept secret and the benefit of it retained. But when all the powers were so eager to extend their colonial possessions that discovery by them without that motive could hardly be imagined, a discovery made by the public ships of a state might be followed by a merely formal act of possession, as planting a flag: the public expedition was notice enough of the intention to appropriate its results, whether or not the formal act was expressly mentioned in the report of those results which ran round the world. But the same conclusion did not follow from a private discovery. There was always some burden attached to extending the territory of a state, were it only the defence of its subjects who settled or acquired interests in the new acquisition, and it was never thought that a state could be saddled with

[1] In the *Fama*, 5 C. Robinson 115.

the burden without its own consent. Consequently it would seem that the intention of a state to appropriate a country discovered by its subjects, or which its subjects have made a commencement of occupying, ought to be quickly signified in some unmistakable mode, if it is to be availed of against foreign interests which have grown up in the country and have led to its being claimed by another state. And this may be regarded as the doctrine generally accepted. It will be observed that Vattel, in the passage which has been quoted from him, only speaks of discoveries made by navigators commissioned by their sovereigns[1]. But in the Oregon dispute the United States rejected the distinction between public and private discoveries, and founded their claim on the discovery of the mouth of the Columbia river by a private adventurer, Captain Gray, followed by an establishment which one of their private citizens made on the Columbia at Astoria, although up to the time when that establishment was sold to the British Northwest Company their government had not adopted the discovery, and had returned no answer to the letter by which Mr Astor had requested it to authorize his proceedings. The British negotiators did not admit the claim, and the region was divided by the convention of 1846. Holtzendorff is so far from attaching importance to the acts of private persons that he does not consider even a discovery by a commissioned officer as founding a title, unless the intention of his government to acquire the territorial sovereignty is proved and made known to the world in general by a public taking possession. And he adds that when an expedition is organised by a government with the avowed object of scientific research, that

[1] See above, p. 157.

object excludes the presumption of the *animus rem sibi habendi*, and the discoveries made by the expedition found no title[1]. In these circumstances it must be admitted that the Conference of Berlin took no great step in advance so far as concerns the principle of publicity, though it acted wisely for the certainty which is so important in international titles, when, as above quoted, it required an express notification for the assumption of territorial sovereignty on the coasts of Africa.

The Ripening of an Inchoate Title into a Complete one.

The second practical question is, *how long a duration may be allowed to an inchoate title by discovery or occupation—that is, after what time will effective occupation come too late to complete the title as against settlements made in the interval by other states or their subjects?* For titles originating in a commencement of possession on the coasts of Africa notified under Art. 34 of Berlin, the analogous question will be, *how long a time must be allowed for fulfilling the obligation recognised by Art.* 35, *namely to establish authority sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon in that general act?* Practically the last question amounts to this: *how long a time must be allowed for organising the country with sufficient solidity to secure the common rights of civilised life?*

Professor Pasquale Fiore has proposed twenty-five years as the term to be fixed "within which the country

[1] *Handbuch des Völkerrechts*, vol. 2, p. 258.

discovered must be really occupied, or within which acts suitable and sufficient must be done for determining the extent of territory which the occupying state is to retain in its real possession[1]." Mr Dudley Field, whom he cites, had already proposed the rule that "the right of possession is deemed abandoned if the intent to exercise it is not manifested within twenty-five years after the discovery[2]." It is needless to say that no definite term has been fixed, and with all deference to the authorities quoted it may be said that much would not be gained by fixing one unless the still more difficult question, what extent of country is affected by the discovery or occupation of one or more points, were settled at the same time. To refer to a constructive abandonment the loss of the inchoate title of which the accompanying conditions have not been fulfilled would be inconsistent with the principles thus far maintained, well as I am aware that that language has often been used. It would imply that the title by discovery or the commencement of occupation was more than inchoate, and, though not followed by effective occupation, need not have been lost if not abandoned; unless it is intended that the abandonment is to be a presumption *juris et de jure*, in which case it seems better to keep the facts in view than fictions. The truth is that the doctrine of constructive abandonment suited certain bygone conveniences. It tended to save the dignity of sovereigns when they were less accustomed to hear of the rules of a society, and of the duties which attended their claims. It squared with fashionable theory, comparing the acquisition of uncivilised regions

[1] *Trattato di Diritto Internazionale Pubblico*, 3rd ed., vol. 2, § 882, (*c*). The citation of Mr Dudley Field is at § 875.

[2] *Outlines of an International Code*, 2nd ed., Art. 76.

to the acts of men living without government in a supposed state of nature, in which state, if it existed, the relation concerned would be property, the moral duties of which are not so strongly marked as those of sovereignty. Where the right of sovereignty has been fully acquired it may be abandoned, as has more than once happened to the island of Tobago ; but that is another matter. For our present purpose, without further dwelling on a definite term of years for the loss of an inchoate title or on its presumptive abandonment, we must observe that since enterprise and necessity have drawn civilised man towards new regions with accelerated speed, less time than before can be allowed for establishing effective occupation and a reasonable measure of authority and order.

We should certainly be going too far if we said that authority must always be present when its action is required. Even in old countries the means of restoring order and punishing its breach are by no means always ready on the spot where a crime has been committed or a right has been violated; and the rights conferred by an inchoate title would be reduced to very small proportions if other states were allowed to enter the region and set up their own sovereignty at every point where their traders may have suffered a momentary injury. Common sense points out that much must depend on the nature and rapidity of the stream of emigration or of enterprise which is directed to the region. The crowds which flock to new gold-diggings must be speedily provided with a government, if it is wished to maintain the pretension to the sovereignty of the country. Pastoral settlements scattered over a vast area may be followed more slowly by a regular administration. What is above all necessary both for

the theorist and the statesman is to bear well in mind that no title can prevail against the substantial non-fulfilment of the duties attached to it, not even if the notification required by the Conference of Berlin has been made and has not met with any objection from the powers which have received it. Dr Geffcken has said:

"It is a very doubtful question whether the Congo state can rightfully claim the sovereignty over a territory of more than 2,000,000 square kilometres with 40,000,000 inhabitants, extending in part over regions entirely unexplored and certainly not yet reduced into possession, even though its right to those limits has been acknowledged by other states. These regions will only become the territory of the Congo state in proportion as they are occupied by it[1]."

I am disposed to adhere to that opinion.

The Geographical Extent of International Titles in Uncivilised Regions.

The questions which may be put with relation to territorial sovereignty in uncivilised regions are so intimately connected with one another that already, when considering how inchoate titles are ripened, we have been obliged to refer to the question what extent of territory is affected by the discovery or occupation of one or more points, and to indicate the principle on which it must be solved so far as complete title is concerned, namely, as Holtzendorff writes:

"No state can appropriate more territory through an act of occupation than it can regularly govern in time of peace with its effective means on the spot[2]."

[1] Heffter's *Europäisches Völkerrecht der Gegenwart*, 8th edn., by Geffcken, p. 159.

[2] *Handbuch des Völkerrechts*, vol. 2, p. 263.

An establishment at one or more points may complete the title to sovereignty over an extent of country within their reach, but it cannot on any geographical considerations be accepted as a substitute for effective authority at points not within their reach.

But our principle does not solve the question which formerly arose when one or more points had been discovered and formal possession taken of them, and which may conceivably now arise on real possession being taken of one or more points on the coast of Africa and all necessary notifications being given in pursuance of Art. 34 of Berlin; namely, *over what geographical extent was or is an inchoate title acquired, to be completed by real possession within a reasonable time?*

In the law of property it is not necessary to perambulate the whole of an estate of which seisin is meant to be taken, when the seisin taken at one point can be referred to some unity otherwise known, as by deeds or records. But in an uncivilised region, as sovereignty in the European sense has no existence prior to the seisin taken, there is no unity which stands in any relation to it; and hence the difficulty which besets the problem. There might have been some convenience, especially to the natives, in allowing the inchoate title to comprise one or more entire tribes, in order that their chiefs might not be exposed to conflicting claims from different states. But such an arrangement could hardly have been made in the case of unsettled hunters, and even in that of agriculturists it has not been much thought of. Thus the final settlement between England and Portugal divided the tribe and country of Umtasa, who we have seen had been judged capable of understanding the finance of the City and the language of

Lincoln's Inn and Exeter Hall[1]. For acquisitions of territory on the coasts of Africa the question, though left theoretically possible, was deprived of almost all practical importance by the fact that the commission at Berlin reported on the draft articles which, as amended, became Arts. 34 and 35, that "it remained understood that the notification was inseparable from a certain determination of limits, and that the powers interested could always demand such supplementary information as might appear to them indispensable for the protection of their rights and interests[2]." Independently then of the partition of Africa which has since taken place, it was in effect settled from 1885 that the limits of inchoate titles would have to be determined at their commencement. All that remains is therefore the historical interest attaching to the various topics of argument which were invoked while much of the world was still undiscovered or unexplored, and of these we will take a summary view. When in old writers those arguments are employed with regard to titles by discovery and formal taking possession, not expressly qualified as to their finality, it must be remembered that the doctrine of presumptive abandonment to which allusion has already been made reduced those titles to a position not much better than that here attributed to inchoate ones[3].

(1) The most extravagant of the claims now in question was that to the back country (*hinterland* in German) to an indefinite extent behind the coast of which discoverers had taken some kind of possession. In the charter which James I granted in 1609 for "the

[1] See above, p. 151.
[2] Annex 1 to Protocol No. 8.
[3] See above, p. 164.

first colony in Virginia," the limits were stated to be along the coast 200 miles northward and the same distance southward from Cape Comfort, "and all that space and circuit of land lying from the sea-coast of the precinct aforesaid, up into the land throughout from the sea, west and north-west." The grants of Carolina and Pennsylvania were similar in principle, and the Georgia charter of 1732 granted "all the lands and territories from the most northern stream of the Savannah river all along the sea-coast southward unto the most southern stream of the Alatamaha river, and westward from the heads of the said rivers respectively in direct lines to the South Seas, and all that space circuit and precinct of land lying within the said boundaries[1]."

(2) This claim to back country was represented by the United States during the Oregon controversy as falling under a more general principle of claim by continuity or contiguity, by virtue of which they maintained that the possession of Louisiana gave them the right to the country as far west as the Pacific, and so far north as to include the region disputed with England. But some attempt was made to limit the principle. "It will not be denied," Mr Gallatin wrote, "that the extent of contiguous territory to which an actual settlement gives a prior right must depend in a considerable degree on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may within a short time be occupied, settled and cultivated by such population, as compared with the probability of its being thus occupied and settled from

[1] The Virginia charter is quoted in the report of *Johnson v. McIntosh*, 21 U. S. 544. The Georgia charter is quoted and those of Carolina and Pennsylvania referred to by Twiss, *Oregon Question*, p. 282.

another quarter[1]." This limitation however leaves the pseudo-scientific principle of contiguity in a position of near equivalence to the "manifest destiny" of rhetoricians.

(3) More scientifically precise than indefinite back country or manifest destiny is the "claim to all the inland territory as far as the line of watershed, founded on the discovery and occupation of an extent of sea-coast, about which position of law," Sir Travers Twiss writes, "there is no dispute amongst nations[2]." A claim falling within these terms may be made in two different cases. We may suppose that two nations establish settlements at the mouths of two rivers which are next to one another on the same coast, and it may then be claimed that their land boundary should follow the watershed of those rivers, notwithstanding that this would give to one of them a tract forming the back country to the settlement of the other. Or we may suppose that the claim is made by a nation ascending a river from its mouth, not as against nations desiring to occupy on its right or left hand, but as against discoverers descending the river, after having reached from the other side its innermost watershed, to which the ascending nation claims to extend by virtue of its occupation of the mouth. In the latter form this was another of the arguments used

[1] Twiss, *Oregon Question*, p. 311: see also p. 301. Mr Calhoun, writing to Mr Pakenham on 3rd September, 1844, spoke of continuity, and represented the claim to the disputed region not as an incident to the possession of Louisiana, but as belonging to the ancient right of the English colonies to extend from ocean to ocean, which he considered, so far as concerned the country west of the Mississippi, to have been ceded to France in 1763, and to have passed from France to the United States as a part of Louisiana. Wharton's *Digest of the International Law of the United States*, vol. I. pp. 6, 7.

[2] *Law of Nations, Peace*, 2nd ed., p. 209.

by the United States on the Oregon question, when they founded on the proceedings of Captain Gray and Mr Astor at the mouth of the Columbia as against those of British adventurers on the head waters of that river[1]. And since Sir Travers Twiss repels the argument so used, it may be inferred that his own statement of the doctrine of watershed was meant to apply only to the case first mentioned. If that doctrine were adopted in its fullest extent it would lead to the conclusion that France, while she held Canada and Louisiana, was entitled to all the basins of the St Lawrence and Mississippi, except such portions of the former as were comprised within the settled area of the English colonies, and such portions of the latter as were well understood to belong to Mexico. But during the negotiations with England in 1761 France repudiated any such claim, and proposed that the Indians "between Canada and Louisiana as also between Virginia and Louisiana should be considered as neutral nations, independent of the sovereignty of the two crowns, and serve as a barrier between them[2]."

(4) The doctrine of middle distance is thus stated by Sir Travers Twiss: "in cases where there is intermediate vacant land contiguous to the settlements of two nations, each nation has an equal title to extend its settlement over the intermediate vacant land, and thus it happens that the middle distance satisfies the juridical title, whilst it is the nearest approximation to a natural boundary and the most convenient to determine[3]."

(5) Another consideration is mentioned by the

[1] See as to the latter proceedings Twiss, *Oregon Question*, pp. 13, 14.

[2] Ib., p. 307.

[3] *Law of Nations, Peace*, 2nd ed., p. 216.

same authority as follows. "When a nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the independence and security of its settlement[1]." And, "where the control of a district left unoccupied is necessary for the security of a state, and not essential to that of another, the principle of *vicinitas* would be overruled by higher considerations, as it would interfere with the perfect enjoyment of existing rights of established domain[2]." But the principle of security can hardly be relied on as governing the distribution of territory except for very small areas contiguous to real settlements. To that extent however it would seem that the title conferred by it should be complete and not merely inchoate.

(6) "Although considerations based on economic and administrative interests, or on political convenience, may throw light on the advantage or disadvantage of a solution conformable to the views of one or other party, such reasons cannot stand in place of a mode of acquisition recognised by international law[3]." This was said by the Baron Lambermont, in his award between the respective British and German companies, on the farm of the customs and administration of the island of Lamu, dated 17th August 1889. The case was not one of discovery or occupation, but of the effect in the circumstances of the acts and engagements of the Sultan of Zanzibar and his predecessor. The doctrine of the eminent arbitrator however is worth noticing here, especially since it shows that the principle of

[1] *Law of Nations, Peace*, 2nd ed., p. 205.
[2] *Oregon Question*, p. 174.
[3] 22 *Revue de Droit International*, p. 353.

security mentioned in the preceding paragraph must be strictly construed.

(7) Islands may be so near a coast and so intimately connected with it that the title to them may follow that to the coast, but in one instance this claim was not only made but admitted to an extravagant extent. The Falkland Islands are considered to have been discovered under Spanish auspices by Amerigo Vespucci in 1502, but were first occupied by the French company of St Malo, whence their French name of Malouines, in 1764. Spain claimed them as "a dependence of the South American continent," and Louis XV, probably less from a sense of justice than on account of the political and family connection of the two courts, surrendered them on the payment by Spain of an indemnity to the company. It is said that Lord Anson, when First Lord of the Admiralty in 1754, had contemplated occupying the islands, but that the British government abandoned the scheme in deference to Spanish objection[1]. In the protocol relative to the Sulu Archipelago which was signed at Madrid by England, Germany and Spain on 7th March 1885, the two former powers recognised Spanish sovereignty over the archipelago, including "the places effectively occupied as well as those places not yet occupied"; and Holtzendorff regards this as a recognition of the principle of effective possession[2]. The arrangement included the renunciation by Spain, "as far as regards the British government," of all claims of sovereignty over any parts of Borneo which belonged or had belonged to the Sultan of Sulu; and that concession

[1] Calvo, *Le Droit International Théorique et Pratique*, vol. 1., § 218.

[2] Parliamentary Paper c. 4390; *Handbuch des Völkerrechts*, vol. 2, p. 266, note 12.

may justify such an interpretation, if it be taken as the price of the recognition of Spanish sovereignty over the unoccupied parts of the islands. There were also commercial stipulations on each side.

Alleged International Title by Civilising Influence exerted beyond the limits of Occupation.

During the recent dissensions between England and Portugal with regard to their mutual limits in Africa, a claim was put forward on behalf of the latter which must be stated in the words of M. Martens Ferrão.

"Portugal has possessed for centuries in Western and Eastern Africa vast colonies governed by Portuguese authorities, in which she exercises *dominium* and *imperium:*

She possesses states in *vassalage* according to the system established in Africa by all colonising nations:

She has also countries with which she has established *rudimentary relations*, founded on the right of first discovery, never abandoned and preserved in this manner. With all these tribes Portugal has always maintained relations by the *rudimentary commerce* of which these peoples are barely capable.

I consider these three formulas to be fundamental ones for determining the relations of colonial right in the mysterious dark continent. These typical forms have even been enlarged by England.

The last is recognised by public law, and will long continue to be so, in the great and uncertain enterprise of calling to civilisation tribes which at present are still either in the lowest state of decadence of the species or in the most rudimentary infancy.

That form, as just and well founded as the others, and not demanding less sacrifice, has been recognised as legitimate, and will always be so as long as true civilisation shall not take its place, an event which is still beyond the range of the most penetrating vision[1]."

The first of the forms thus enumerated needs no remark. It is that of a colony in which a civilised

[1] Pamphlet quoted above, p. 146, at p. 9 of the copies with the imprint of Rome. The italics are those of M. Martens Ferrão.

government is in operation under the direct authority of individuals of European race. In the second form the eminent writer appears to contemplate the immediate authority being exercised by the chiefs or other heads of the vassal state, subject to the control of the suzerain state. That is a situation with which we are familiar in the case of a protectorate exercised by a civilised state over another state possessing a civilisation of the same or of a different kind, but it may be doubted whether it is a possible situation where the people dignified with the name of a vassal state is uncivilised. M. Martens Ferrão may have framed his second formula on examples of the former class, such as those of Tunis and Zanzibar; and the traditions of such so-called empires as that of Monomotapa, handed down from the magniloquence of early explorers, may have affected his view of the possibility that natives like those with whom the Portuguese were in contact might be placed in relations similar to those of Tunis or Zanzibar. The third form is that with which we are now concerned, and it contemplates a title to territory having its roots in discovery and kept alive, not by occupation, for in that case it would have been superfluous to mention anything more than the occupation, but by rudimentary relations, commercial or other, entertained with tribes whom it is desired gradually to civilise at the cost of some sacrifice to the state maintaining the relations.

There is grave objection to basing an international title on any efforts for the civilisation of native races, because the value and efficacy of such efforts are sure to be differently appreciated by the power which builds on them and by the power against which the title built on them is invoked. The use of an international title

is to decide controversies, and to have that effect it ought to be based on facts to which, if I may use the expression, a yard measure can be applied. If the civilising agency of the state to which the discovery belongs is founded on a real occupation of the country accompanied by the establishment of authority in it, the yard measure is found in such occupation. When this is not the case, the civilising agency can mean little, if anything, more than either the work of religious missionaries or the indirect effect of commerce carried on by the natives with the discoverers and their successors. But commerce finds its recompense in itself, and will not justify the proposition that the third form of colonial expansion contemplated by the Portuguese statesman demands not less sacrifice than the other two, each of which involves the burden of government or of control. The profit which a state derives from trade cannot confer any right to exclude other states from the region in which it is carried on.

If on the other hand the civilising agency takes the form of missionary enterprise—which M. Martens Ferrão does not mention, and cannot be supposed to have intended—it is now generally acknowledged that to erect proselytism into an international title to aggrandisement would be highly injurious to sound religion and to peace and goodwill among men. Alluding to the dispute between Spain and Germany which was adjusted by the mediation of the Pope in 1885, Holtzendorff says: "even the sending of missionaries to convert the natives, on which the Spanish government founded in the controversy about the Caroline Islands, can no longer be considered as an act of occupation because it was the church that sent them[1]."

[1] *Handbuch des Völkerrechts*, vol. 2, pp. 258, 9.

It is conceivable that the native population of an unoccupied country may be so permeated by influence proceeding in one way or another from a people of European race that they may have gone far towards adopting its distinctive form of civilisation and religion. There is perhaps no instance in which an uncivilised population has made so great an advance without the training and discipline which results from European government or control, but the supposition may be made. In that case it might be morally wrong for another European nation to step in and check or divert so admirable a development. But the state which lost the prospective benefit of colonial expansion over the natives in question would only have to blame itself for not having asserted in good time, over such promising neighbours, an authority which in the supposed circumstances could scarcely have been other than welcome.

On no ground then does it seem possible to admit that an international title to territory can be acquired through civilising influence exerted beyond the limits of occupation.

Protectorates in Uncivilised Regions.

In the civilised world a protectorate has long been familiar as a relation existing between two states, of which the protected one is controlled or even wholly represented in its foreign affairs by the protecting one, while the latter has such authority in the internal affairs of the former, if any, as the arrangements between them provide for. The protected state is therefore not independent, but neither does it altogether lose an international existence, for its foreign affairs are distinctly its own, even when wholly managed for it

by the protecting state. Thus the republic of the Ionian Islands, which was under the protection of the United Kingdom, was not a party to the Crimean war, waged by Turkey, England, France and Sardinia against Russia, because England did not make it such a party although she might have done so. Consequently the international position of a protected state falls under the general head of semi-sovereignty. On the other hand the relations between the protected and protecting states, whether in respect of the authority which the latter has over the foreign affairs of the former or of that which may be allowed to the latter in the internal affairs of the former, are constitutional relations. The two constitute a single system, possessing and exercising all the powers which belong to civilised government, and not subject to the interference of any third state as to the distribution of those powers but regulating that distribution for themselves[1]. An example lying wholly within Europe is still presented by the protectorate of the kingdom of Italy over the republic of San Marino, but the commonest case by far is now that of a protectorate exercised by a state of European civilisation over one of other civilisation, as that which France exercises over Tunis and that which England exercises over Zanzibar.

Where there is no state, that is to say in an uncivilised region, there can be no protected state, and therefore no such protectorate as has been described in the last paragraph. But in recent times a practice has arisen by which in such regions civilised powers assume and exercise certain rights in more or less well defined districts, to which rights and districts, for the term is used to express both the one and the other,

[1] See above, pp. 87—89.

the name of a protectorate is given by analogy. The distinctive characters of those rights are, first, that they are contrasted with territorial sovereignty, for, as far as such sovereignty extends, there is the state itself which has acquired it and not a protectorate exercised by that state; secondly, that the protectorate first established excludes all other states from exercising any authority within the district either by way of territorial sovereignty or of a protectorate—that is to say, while it lasts, for the question remains whether a protectorate, like an inchoate title to territorial sovereignty, is not subject to conditions and liable to forfeiture on their non-fulfilment; thirdly, that the state enjoying the protectorate represents and protects the district and its population, native or civilised, in everything which relates to other powers. The analogy to the protectorates exercised over states is plainly seen in the last two characters, exclusiveness and representation with protection. It is less visible in the first character, for, where there is a protected state, the territorial sovereignty is divided between it and the protecting state according to the arrangements existing in the particular case, while in an uncivilised protectorate it is in suspense. But on the whole the analogy is sufficient to account for the extension of the old term to the new case, although to account for is not necessarily to justify, and perhaps it might have been better had a new term been used.

The classical passage as to the international status of protectorates in uncivilised regions is the sixth chapter of the general act of the African conference of Berlin, of which the heading is: "*Declaration relative to the essential conditions to be observed in order that new occupations on the coasts of the African*

continent may be effective, and which consists of the two articles nos. 34 and 35, of which the texts have been already given[1]. It will be observed that the first of these articles expressly subjects the assumption of a protectorate to the same condition of notification, carrying the same opportunity for objection to be made to it by any power receiving the notification, to which the acquisition of a possession, that is of territorial sovereignty, is subjected. And it will further be observed that the second of those articles expressly mentions neither a possession nor a protectorate, but defines the obligation to establish authority which is incumbent in the case of a new *occupation*, that being the term which alone is also used in the heading of the chapter. On this it has been argued that protectorates as well as possessions are included in the occupations mentioned in the heading and by Art. 35, but that conclusion may be questioned. The heading of a chapter must be brief, and cannot always name every subject treated of in it. And the first draft of Art. 35 mentioned protectorates, but their mention was struck out on the proposal of the British ambassador, and M. Busch, the German under-secretary of state, in accepting its omission, described the omitted words, not as superfluous, but as those "which subject protected territories to the same conditions as occupied territories[2]." The point may not be without importance, because occupation is a well understood term in international law, and if it was applied at Berlin to protectorates it would be difficult to resist the conclusion that at least a commencement of occupation was thought necessary for the establishment of a protectorate. But in fact

[1] See Art. 34, above, p. 161, and Art. 35, above, p. 159, note.

[2] Annex 1 to Protocol 8 of the Berlin Conference.

such protectorates as we are considering have been established in Africa without even a commencement of occupation, or at least with no such commencement of which the legal effect could reasonably be extended over the great areas over which they have been established. The caution of the British ambassador in objecting to the inclusion of protectorates in Art. 35 may be justified on that ground, and on the further ground that the article as drafted did not distinguish protectorates in uncivilised regions from those over states, which are subject to very different considerations. The authority necessary for the purposes of civilised life already exists in a state, so that the obligation of the protecting state is not to ensure its establishment but to see to its proper working where foreigners are concerned.

But I am at one with Mr Hall in the opinion expressed in the very valuable work lately published by him, to the effect that a protectorate on the coast of Africa carries an obligation of establishing authority equal to that laid down in Art. 35, although that opinion for me is not based on the article but on the nature of the case. And while he considers that the obligation which he finds to be stipulated for the coast implies even for an inland protectorate a consent to civil and criminal jurisdiction over foreigners, as being necessary for the establishment of the authority, it seems to me that that consent also is carried by a protectorate over any uncivilised region, and again from the nature of the case[1]. A protectorate which was not exclusive would not make for peace, and was certainly never intended. But when the exclusive character of a protectorate is admitted, surely it follows

[1] *Foreign Powers and Jurisdiction of the British Crown*, p. 214.

that the government required by the conditions of the region must be supplied by the state which excludes all others from supplying it, and that that state is armed by all others which recognise its protectorate with their consent to its exercise of jurisdiction, indispensable for the purpose, over their subjects within the recognised area. It is true that in inland places there may be a greater difficulty of maintaining effective jurisdiction than on the coast, but then correspondingly there will be less need for it, or the form of authority necessary for efficacy will be less elaborate. As communications are opened and improved, settlement and the means of government will advance with parallel steps.

"It is believed," Mr Hall says, "that all the states represented at the Berlin conference of 1884—5, with the exception of Great Britain, maintained that a protectorate includes the right of administering justice over the subjects of other civilised states; and by the first article of the general act of the Brussels conference of July 1890 the powers, in this instance inclusive of Great Britain, declared 'that the most effective means for counteracting the slave trade in the interior of Africa are the following :—(1) progressive organisation of the administrative, judicial, religious and military services in the African territories placed under the sovereignty or protectorate of civilised nations'; in the second to the seventh paragraphs are prescribed the establishment of occupied stations, roads, railways, inland steam navigation, telegraph lines, and the maintenance of restrictions on the importation of firearms and ammunition. Evidently on the one hand acts of the nature contemplated and prescribed compel extensive interference with the internal sovereignty of a community[1], and involve a commensurate assumption of sovereignty by the protecting state; on the other, the objects aimed at can hardly, if at all, be attained compatibly with the exemption of European traders and adventurers from the local civilised jurisdiction[2]."

We are thus led to the conclusion that the third distinctive character above attributed to a protectorate

[1] It is needless to repeat that the system advocated in this book does not permit us to speak of the sovereignty of African savages.

[2] *Foreign Powers and Jurisdiction of the British Crown*, p. 207.

over an uncivilised district—namely that the state which enjoys it represents and protects the district and its population, native or civilised, in every thing which relates to other powers—might have been put higher. It would be true to say that the state which enjoys it possesses the full powers of sovereignty over the district and its population, perhaps with the exception that a protectorate, being comparable to the personal relation of guardianship, may not be alienable by cession as territorial sovereignty is. And we are led to answer the question suggested above in connection with the second distinctive character attributed to these protectorates, namely their exclusiveness, by saying that in no case can the powers of territorial sovereignty be retained in spite of a persistent non-fulfilment of the duties attaching to them, and that consequently these protectorates stand on the same provisional footing as the inchoate title to territorial sovereignty. It will be asked why, this being so, it was found necessary to establish this class of protectorates at all; why a country assuming such a protectorate might not equally well notify that it had acquired a new possession, subject to the obligation of the establishment of authority incident to new occupations? The answer to be given is rather a practical than a theoretical one. Over an area far transcending any attempt even at a commencement of occupation, a protectorate will be more easily admitted by other powers than either an inchoate title to possession or, to use the old language, a title by discovery and formal possession to be lost by presumed abandonment on failure to take real possession. The three theoretical forms may be nearly equivalent, but the power of names is great. Even the state which

assumes the protectorate feels itself less committed. If it wearies of its task, it can abandon a protectorate with less loss of self-respect than a possession, even though the latter be held only by a title admittedly inchoate. Practically then the institution of protectorates over uncivilised regions has given greater freedom to the initial steps towards their acquisition.

It remains to notice the question how far British legislation has entrusted British courts with the jurisdiction, especially over the subjects of foreign powers, which is necessary to the performance of the international duties attached to British protectorates in uncivilised regions, and which we have seen is generally admitted by foreign powers to belong internationally to such protectorates. This is indeed not a question of international law, but the branch of it which relates to the power of the crown to supply such legislation by order in council involves questions which it may be useful to consider. The Foreign Jurisdiction Act 1890, s. 1, declared that the queen may exercise any jurisdiction which she then had or at any time thereafter might have within a foreign country. A protectorate is a foreign country, the rights held over it being still distinguished from territorial sovereignty, by however thin a line. And jurisdiction over persons of all nationalities, which is attached by the general understanding of states to a protectorate itself recognised by them, must surely fall within the description of jurisdiction which the queen has. But it has been suggested that the meaning of the section must be cut down by reference to the recital that "by treaty, capitulation, grant, usage, sufferance and other lawful means, Her Majesty the queen has jurisdiction within divers foreign coun-

tries"—combined with the fact that the act is a consolidating one, and that at the dates of the acts consolidated, or at least at that of the original act of 1843, the queen had no jurisdiction through protectorates. I cannot adopt that suggestion. It seems to me incorrect to say that "the act of 1843 referred only to certain wholly independent states, in which a limited jurisdiction over British subjects had been obtained in the various ways specified in the recital." Such jurisdiction may have been all that there then was to fall within the section, but the section referred to all that might fall within its terms. It will hardly be said that the section cannot be applied to jurisdiction acquired since 1843, or even since 1890, within independent states, by any of the means specifically mentioned in the recital. And if the section is not to be confined to jurisdiction existing in 1843, as little I think can the words "other lawful means" be confined to means which were lawful in 1843, so as to exclude jurisdiction acquired by a class of protectorates which has since become internationally lawful. I conclude that the section in question empowers Her Majesty to grant to her courts in protectorates the jurisdiction over all persons there which is necessary for maintaining order and enforcing rights. No argument to the contrary can be drawn from the s. 2 of the Foreign Jurisdiction Act 1890, which gives the queen jurisdiction, but only over her own subjects, in "a foreign country not subject to any government from whom Her Majesty might obtain jurisdiction in the manner recited." The countries so described would be those outside both states and protectorates; and such description of them involves the assertion, insisted on in this chapter, that the uncivilised natives who inhabit

them are not sources by cession from whom the queen can obtain the powers of civilised government. A country over which the civilised world has so far asserted its authority as to recognise the establishment of a protectorate over it is not one in which the acquisition of jurisdiction is impossible.

Mr Hall, who takes the limited view of the operation of the Foreign Jurisdiction Act, argues that "in assuming a protectorate the crown takes to itself powers which, so far as they go, are identical with those that it would have in a conquered country. It can prescribe laws until parliament chooses to legislate, and it can subject to its administration all persons upon the protected soil[1]." This seems to be sound. The power which the crown has in a conquered country is that which is conferred on the state by international law, and which is deposited in the crown because the constitution of the United Kingdom has made no provision for its being deposited elsewhere. In the same way the power which international law confers on the state in the case of a protectorate is deposited in the crown till parliament may provide for its being deposited elsewhere. Perhaps it may be said that this reasoning is inconsistent with the decision in *The Queen v. Keyn*[2]. But that decision, whether it was right or wrong, was that the jurisdiction of English courts could not be enlarged by the development of an international doctrine that the sea within the three-miles limit was territorial. And it does not follow that the crown is unable to accept for the benefit of the state an authority given by the development of an international doctrine about protectorates, when such acceptance does not affect the jurisdiction of an

[1] U. S., p. 225. [2] L. R., 2 Exch. 63.

English court or anything else internal to the realm of England. Whether therefore under the Foreign Jurisdiction Act or by the analogy to conquest, we may fairly conclude that the queen, by order in council, can confer jurisdiction over foreigners on her courts in her protectorates in uncivilised regions.

On the question whether she has done so it will be sufficient to refer to Mr Hall's able discussion in the work mentioned. He sums up as follows.

"It is clear that in the less developed instances Great Britain has assumed smaller powers than might reasonably have been taken, and that in some cases, as for example on the Somali coast, enough power has certainly not been appropriated to meet the demands which may rightly be made by foreign states, or to prevent the continuance or establishment of foreign extraterritorial jurisdictions, the existence of which may be productive of grave embarrassment in the future. On the other hand, in the protectorates where she has invested herself with fuller powers, while refraining from any undue invasion of internal sovereignty, she has secured to herself sufficient authority to meet all contingencies[1]."

Spheres of Influence.

Spheres of influence result from mutual agreements of abstention made by two or more powers. An example may be taken from the declaration of 6th April 1886, by which England and Germany defined their respective spheres of influence in the Western Pacific. The reciprocal engagement was in these terms.

"Germany [Great Britain] engages not to make acquisitions of territory, accept protectorates, or interfere with the extension of British [German] influence, and to give up any acquisitions of territory or pro-

[1] *Foreign Powers and Jurisdiction of the British Crown*, p. 220. With reference to what is said about an undue invasion of internal sovereignty, it must be remarked that, in the chapter quoted from, protectorates over states are treated of as well as protectorates over uncivilised regions.

tectorates already established, in that part of the Western Pacific lying to the east south-east or south [west north-west or north] of the said conventional line."

This was accompanied by certain collateral stipulations, as may always be the case; but the essence lies in the promise by each contracting party to abstain from every form of aggrandisement on the other side of the boundary agreed on. On its own side of the boundary each must pursue its aggrandisement, if at all, by the methods and subject to the conditions applicable in other cases to the acquisition of possessions or protectorates. A sphere of influence is not in itself a recognised form of aggrandisement, and if either power, within the sphere reserved to it, meets with a third power not a party to the agreement, the rights of such third power are intact. The agreement is *res inter alios acta*, and cannot be quoted against it.

A very remarkable incident in connection with this subject is the agreement of 12th May 1894, by which England granted to the Congo state a lease of certain territories in which England herself had no other right than that arising from agreements made by her with Germany and Italy, by which those powers respectively delimited with her their spheres of influence in such manner as to leave the territories in question in the British sphere. If it be admitted that sovereignty is an apt subject for a lease, still that admission would not cover the case. No one can lease more than he has, and here all England had was the right to the abstention of Germany and Italy; while those powers might well say that an agreement for abstention is of a personal nature, in other words that state (A), which has made such an agreement in favour of state (B), cannot be forced, either by lease

or by an attempt at permanent transfer, to treat it as binding in favour of state (C), which it might think a less desirable neighbour. In fact neither Germany nor Italy has objected, though Germany objected to another clause of the same agreement with such effect that it was cancelled by the parties. By that clause the Congo state had leased a part of its territory to England, thereby bringing the latter into a geographical situation to which Germany had refused to consent when delimiting her own sphere of influence with her. It was therefore natural that Germany should desire to object to the same effect being produced by an arrangement made between England and the Congo state, even for the duration of a lease. But that she could do so proves that the principle established with regard to the map of Europe, that any alteration in it is matter of common interest to all the European powers, and can be objected to by any of them which may think the case requires it, is beginning to be recognised for the map of Africa also. Nor is it at all surprising that this should be so, now that the European powers have acquired such important interests in conterminous parts of that continent.

CHAPTER X.

THE EMPIRE OF INDIA.

The East India Company and Companies in general.

We have seen in what relation states stand to international law, whether they are the fully sovereign states of the white society whose rules are that law, or semi-sovereign, oriental or protected states[1]. We have also seen how the uncivilised part of the world is related to international law, by what means states appropriate portions of it as their possessions, how beyond the limits of their territorial sovereignty they exercise over other portions of it protectorates not to be confounded with those exercised over states, and how, in regions still less advanced, they agree to leave each other free scope within limits which as between the contracting parties mark out their spheres of influence. India presents no further kind of international relation to be added to these: indeed it would be difficult to imagine any kind which would not fall within one or other of the foregoing. But the modern

[1] See above, as to semi-sovereign states, pp. 87—90; as to oriental states, pp. 82, no. 12, and 102, 103; as to protected states, pp. 177, 178.

history and present political arrangement of India, apart from the great interest they must offer to Englishmen, furnish to the student of international relations a remarkable example of the rapidity and ease with which such relations may shift in substance while remaining unchanged in form, so that even instructed observers have sometimes been bewildered as to their true classification in their successive phases.

It may have occurred to some that, in saying that India presents no kind of international relation which has not already been touched on, it must have been intended to refer to the system under which she is now governed, and not to a history which includes that of the East India Company. But the statement was meant to refer to the history as well as to the present political conditions of India. An incorporated company is the creature of the state to the law or to the government of which it owes its corporate existence and powers, and if it is incorporated for an object which brings it into relations with foreign states, the state which has created it cannot escape responsibility for the acts of its creature. The relations into which the company was empowered to enter, or into which it has in fact entered without being restrained by its parent state, are those of the parent state, of which for all such purposes the company is as much an organ as the department of its government ostensibly entrusted with the conduct of its foreign affairs, or as the commanders of the forces which the state employs in its own name. In framing the constitution of the company care may or may not have been taken that its members or its directors shall be subjects of the state which grants the incorporation,

but that does not matter. The company, as a technical person having an existence in law, is a technical subject of the state which has called it from nothingness into that mode of being. Such was the case of the East India Company, and such is now the case of the Imperial British East Africa Company, the British South Africa Company, and others. If any of these companies acquires territory, the territory and the international sovereignty over it belong to the British crown, though they may be held mediately by the company, as the Earls of Derby were at one time mediately kings of the Isle of Man. If the company, in its character of a mediate territorial sovereign or in any other character, suffers wrong from a foreign state, or from a company similarly created by a foreign state, as the Dutch East India Company or the Mozambique Company of Portugal, the British Crown can treat the wrong as done to itself or its subjects. If the company does wrong to a foreign state or company, the British Crown is responsible to the same extent as if the wrong were done by a natural person being a British subject, and so far further as the commission of the wrong may have been made possible or facilitated by the incorporation of the company or the powers granted to it. If the company is engaged in hostilities with a foreign state or a company created by a foreign state, there is war *de facto* between England and the state in question, and it is at the choice of either to treat it avowedly as an international war if it pleases. Consequently we shall consider as international lawyers that the part which the East India Company has played was played by England. Any distinction which might be drawn between the times before and after the assumption of direct rule in India

by parliament and the Crown, as it would relate only to the organ by which the British state was pleased to act, must belong not to international but to constitutional history.

That whatever the East India Company held it held mediately as an organ of the state, was implied by parliamentary interference with the company from its commencement in 1773, and was expressed in the subsequent renewals of the company's charter. The act of 1793 confirmed the title of the company to its territorial acquisitions "without prejudice to the claims of the public." The act of 1813 declared that its provisions were without prejudice to "the undoubted sovereignty of the crown of the United Kingdom of Great Britain and Ireland in and over the said territorial acquisitions." The act of 1833 declared the company to be "trustees for the crown of the United Kingdom," and by the act of 1858 the trusteeship was terminated and the sovereignty of the state, which had never been doubtful to the discerning eye, was unveiled to every one.

Rise of the British Empire in India, from the point of view of International Law.

Bombay was acquired by England in full sovereignty, by cession from Portugal, as a part of the dower of Catherine of Braganza. With that exception, the condition of India and the position which the East India Company held there in the eighteenth century may best be understood by the analogy of the Holy Roman Empire between the Peace of Westphalia in 1648 and its extinction in 1806. The states of that empire acknowledged the emperor as their suzerain,

but they were formally empowered to enter into foreign relations of great importance on their own account and in their own names, and the emperor and the imperial diet were quite unable to enforce the formal limitation of their foreign relations. Therefore, following fact and not constitutional theory, the states of the empire were not treated by the other powers as semi-sovereign but as full members of the European international society[1]. The Mogul empire had fallen into a similar decrepitude, and its provincial governors, as the Nizam of the Deccan and the Nawab Wazir of Oude, asserted a practical independence similar to that of the German states, but, again similarly, without wholly ignoring the nominal sovereign of India. The confusion into which India fell was increased by the apparition of merely insurgent powers, as the Marhattas, and became beyond comparison greater than any confusion which existed in Europe, so that the British company was compelled to provide for its own defence. In doing so it became an Indian power enjoying the same practical independence as the other rulers who had risen on the ruins of the Moguls. It treated those rulers as internationally sovereign, and made alliances, wars and peace with them, just as England and France acted with regard to the elector of Brandenburg or of Bavaria. But like the Nizam and the rest it bowed, in compliment only, to Mogul supremacy, again as England and France, Brandenburg and Bavaria, all admitted on paper that the Holy Roman Emperor was the head of Germany.

Thus, when the company obtained from the emperor of Delhi the confirmation of the grants of certain districts which they had already received from the Nizam of the Deccan and the Nawab of the Carnatic—

[1] See above, pp. 56, 57, 80.

or when it obtained from him a grant of the *dewannee*, or administration and enjoyment of the revenue, of Bengal, Behar and Orissa, of which provinces it was already in secure possession through the victory of Buxar, gained by Major Munro over the forces of Mir Kasim of Bengal and the Nawab Wazir of Oude—this was very similar to what occurred when Francis II, in his capacity of Holy Roman Emperor, ceded to France at Lunéville in 1801 territory including what she had already obtained from Prussia by the treaty of Basle in 1795[1]. At least in each case there was the acceptance of a paper title to confirm what had been acquired by cession or conquest from the real predecessor, the difference being that the paper title which Clive deemed it convenient to seek maintained the paper supremacy of the Great Mogul, while the First Consul used the authority of the Holy Roman Emperor for its own extinction in the territory in question.

The emperor of India had become a puppet in the hands of the Marhattas when the great campaign, memorable for the victories of Wellesley (Wellington) at Assaye and Argaon and of Lake at Delhi and Laswari, was terminated by the treaty of Sarje Arjengaon, concluded 30th December 1803 with Sindhia, the Marhatta ruler of Gwalior. By that treaty Delhi was left in British hands, and the Marhattas ceased to pull the strings of the puppet, but England declined the farce of pulling them in her turn. The time had come for her to assume a position more nearly in accordance with her real power. The *modus vivendi* which was established between the Company and the

[1] The analogy is not affected by the emperor's want of constitutional power to make that cession without the concurrence of the diet.

politically effete representative of the Moguls is thus described by Mr Tupper:

"The emperor sought the protection of the British government, and it was arranged that certain territories near Delhi should be assigned as part of the provision for the maintenance of the royal family; that these lands should remain under the charge of the resident at Delhi; that the revenue should be collected and justice administered in the name of Shah Alam under regulations fixed by the British government; that the king should appoint a dewán and other officers; and that two courts should be established for the administration of the Muhammadan law to the inhabitants of the city of Delhi and of the assigned territory, death sentences however being subject to confirmation by the king[1]."

An honourable position, commensurate with the splendour of their former estate, was thus made for the Mogul family within a narrow area, subject to British control even there. But outside that area no use was any more made of the imperial name to cloak the independence of the British power.

"In describing these arrangements on June 2, 1805, Lord Wellesley wrote: 'It has never been in the contemplation of this government to derive from the charge of protecting and supporting His Majesty the privilege of employing the royal prerogative as an instrument of establishing any control or ascendancy over the states and chieftains of India, or of asserting on the part of His Majesty any of the claims which in his capacity of emperor of Hindustan His Majesty may be considered to possess upon the provinces originally composing the Mogul empire.' The benefits claimed were the preclusion of hostile projects, which might be founded on the restoration of the authority of the emperor under the direction of agents of France, and the confidence and good feeling amongst states and people which the British government could secure by becoming the lenient protector of the representative of the house of Timur. The Delhi emperor was not to be a Nawab of Arcot or a Nawab of Murshidabad, for the purpose of consolidating British dominion throughout the continent; for indeed the days when it was necessary to proceed under the countenance of some native power had passed away[2]."

Thus it was but an empty form that for nearly forty years more, till Lord Ellenborough stopped the

[1] *Our Indian Protectorate*, by Charles Lewis Tupper, p. 38.
[2] Ibid., p. 39.

practice, bags of gold were offered to the Great Mogul by officers representing the British government. Such tribute, if it can be so called, had no greater significance than the presents which down even to our own times Burma and Siam have sent to the court of Pekin. All that can be said is that a nation less conservative of old usages than the English would have sooner discontinued the practice[1]. Certainly, from 1803, in order to find a European analogy for the relations of England to the princes whom she encountered in India, it would no longer be correct to refer to the Holy Roman Empire. But it must not be supposed that this made a substantial difference in the situation, any more than the fall of the Holy Roman Empire made a difference to the real relations between the German states and other European powers, or between the German states themselves. And in connection with the history both before and after 1803 we must next note a circumstance bearing on the rules of international law as applicable in India, and not on the formal footing on which the powers stood between whom those rules were to be observed.

If the reader will refer to what has been said on the *Rights of Self-preservation actually allowed by International Law*, and on the *Alleged right of Self-preservation against the Contagion of Revolution*[2], he

[1] It was a bad practice, all the same. When the emperor of Delhi was tried and sentenced for joining the mutineers in 1857, it might have been pleaded, at least in mitigation, that only some fifteen years before his dynasty had been still led to believe that England was its tributary. We fight against an evil as long as we deem it to be formidable, and as soon as we think we have overcome it we appear to take a delight in preserving the symbols of it. That is all very well for ourselves, if such is our pleasure, but allowance ought to be made for its effect on the minds of others.

[2] Above, pp. 114—120, 122—125.

will see that no provision is there contained for the case of a country's falling into a condition of chronic misgovernment and anarchy, constituting in itself a standing danger to neighbouring countries, apart from any threat of attack on them or unlawful propaganda of political principles, and from any preparations leading reasonably to the inference that such attack or propaganda is intended. Such a case was not contemplated in the sections mentioned because it does not occur and can scarcely be imagined as occurring in the international society of the white race, and therefore it cannot be expected that the law of that society shall provide for it[1]. But it is unhappily a case by no means unknown among those states of other civilisations with which the white race is compelled to be in contact, and this is one of the causes why the primary rules of international law cannot be extended without limitation to the intercourse resulting from such contact[2]. It is eminently an occasion for applying the principle that the want of a rule to define the action allowable does not exclude all action, which has been noticed as having a large field in dealings between members of the international society and outsiders to that society[3]. The existence of such a case in Turkey in 1821 was revealed by the Greek insurrection, and a majority of the great powers had at last

[1] It will be remembered that chronic anarchy constituting a standing danger to neighbours was the pretext for the successive partitions and ultimate suppression of Poland, but the case, even as it stood, was far from being as bad as was represented, and the neighbours, with cruel foresight, had systematically thwarted all the attempts at reform which were not wanting in Poland. The example has met with general reprobation, and is a warning against inscribing any such principle in the body of rules to be applied between ordinary European and American states.

[2] See above, p. 82, no. 12, and pp. 102, 103.

[3] Above, p. 79, no. 5.

to recognise the fact and act on it, although that result was delayed by the obstinate attempt of Austria to extend her then favourite principle of legitimacy even to the Ottoman empire, an attempt which Russia for a time unavailingly combated on the ground of religion instead of that of misgovernment. In India England could not be long in perceiving that the internal anarchy of the states beyond her borders was one of the chief causes which had compelled her to advance, and that, unless it was checked, it would continue to compel her to advance. Lord Cornwallis hoped that the policy of non-intervention would lead to its being checked, by permitting the growth of strong organisations outside British India through what would now be called the survival of the fittest[1]. It is not for us to study here how that expectation was disappointed, for we have to do with history only in its bearing on international law. But our purpose obliges us to notice how Lord Wellesley in 1801, impelled by the necessity which arose from the condition of Oude, "annexed more than half the country and endeavoured, without success, to provide for the better government of the residue[2]." Lord Cornwallis's system, even had Lord Wellesley been inclined to adopt it, would not have been applicable to Oude, the geographical and other circumstances of which hardly permitted its being absorbed without danger to us in any strong extra-British organisation. In the result, in spite of numerous threats, the successive kings of Oude refused to conduct themselves better in the territory which remained to them, and in 1855 it was recognised that the situation had become intolerable, and annexation

[1] Lee-Warner, *The Protected Princes of India*, p. 91.

[2] Tupper, *Our Indian Protectorate*, p. 65.

was determined on. In the minute written on that occasion by him as a member of council, Sir J. P. Grant placed our right, among other grounds, on our having succeeded to the empire of the Mogul, and to his duty of terminating incorrigible misgovernment in his dominions. Lord Dalhousie, in his minute, rejected that ground, but in his dealings with Sattara he had claimed that the British government was "the successor of the emperors of Delhi[1]." These however, on one side or the other, were the reasonings of individual statesmen. In no public act did the British government claim any political power as deduced to it from the pageant dynasty which it maintained at Delhi, and even in 1801 Lord Wellesley dealt with Oude as an independent state, regardless of constitutional memories which had ceased to have any correspondence with fact. The intervention on the ground of misgovernment to which he had recourse was not founded on any question about Oude's possessing that character, but on the principles of international law which it was necessary to apply to independent states in India.

The native states have since lost the character of independence, not through any epoch-making declaration of British sovereignty, but by a gradual change in the policy pursued towards them by the British government. Encountering the ambition of some of its neighbours and the internal anarchy of others, and the efforts of France or of French adventurers to build on those elements a power rivalling its own, that government was early led to see that its only security, even within the limits which it had from time to time attained, was to make for itself among the states of

[1] Tupper, *Our Indian Protectorate*, pp. 76, 78, 87.

India such a preponderant position as Charles V, Louis XIV and Napoleon had essayed or were essaying with less justification to make for themselves among the states of Europe. This, and little more, was its purpose until ten years after the time when the Great Mogul ceased to be a mysterious fountain from which his strongest neighbour might pretend to draw authority.

"With respect to the French, supposing the present questions in Europe not to lead to an immediate rupture, we are now certain that the whole course of their policy has for its object the subversion of the British empire in India, and that at no distant period of time they will put their plans in execution. It is absolutely necessary for the defeat of those designs that no native state should be left to exist in India which is not upheld by the British power, or the political conduct of which is not under its absolute control." Sir George Barlow, on the policy of the treaty of Bassein (31st December 1802), 12th July 1803: Tupper, *Our Indian Protectorate*, p. 33.

"The fundamental principle of His Excellency the governor-general's" [Lord Wellesley's] "policy in establishing subsidiary alliances with the principal states of India is to place those states in such a degree of dependence on the British power as may deprive them of the means of prosecuting any measures or of forming any confederacy hazardous to the security of the British empire, and may enable us to preserve the tranquillity of India by exercising a general control over those states, calculated to prevent the operation of that restless spirit of ambition and violence which is the characteristic of every Asiatic government, and which from the earliest period of Eastern history has rendered the peninsula of India the scene of perpetual warfare, turbulence and disorder. The irremediable principles of Asiatic policy, and the varieties and oppositions of character, habits and religions which distinguish the inhabitants of this quarter of the globe, are adverse to the establishment of such a balance of power among the several states of India as would effectually restrain the views of aggrandisement and ambition and promote general tranquillity. This object can alone be accomplished by the operation of a general control over the principal states of India established in the hands of a superior power, and exercised with equity and moderation through the medium of alliances contracted with those states on the basis of the security and protection of their respective rights." Despatch from the Indian government to the resident at Hyderabad, 4th February 1804: Ibid., p. 40.

"The picture above drawn of the state of politics among Asiatic

powers proves that no permanent system can be adopted which will preserve the weak against the strong, and will keep all for any length of time in their relative situations and the whole in peace, excepting there should be one power which, either by the superiority of its strength, its military system or its resources, shall preponderate and be able to protect all." Reply of General Wellesley (Wellington) to Lord Castlereagh's strictures on the treaty of Bassein, probably written in November 1804: Tupper, *Our Indian Protectorate*, p. 36.

The chief place among the alliances referred to in the second of the preceding extracts was held by those known in Indian history as subsidiary alliances. These attained under Lord Wellesley, though they did not originate under him, a developed form which, with more or less variation in particular cases, may be described as follows. They established friendship between the contracting parties, who employed towards one another all the complimentary language befitting independent powers, and British interference in the internal affairs of the native state was excluded. The native prince bound himself to have no negotiations with any other power without giving previous notice to the company's government and entering into mutual consultation with it, and to submit his differences with third parties to the company, which was to aid him if it failed to adjust the difference on reasonable terms; and he on his part was to help the company in case of attack on it with forces fully proportioned to his means. The company was to supply a certain subsidiary force, not to be employed on trifling occasions or in collecting the prince's revenue, but to execute services of importance, such as the care of the prince's person, the protection of his country from invasion, and the suppression of rebellion against him; and the cost of that force was borne by the prince, either in periodical payments or, as was oftener the case, by the

cession of territory deemed equivalent. And there might or might not be a stipulation for another force, called a contingent, to be maintained by the prince for general service with the British troops pursuant to his obligations, and to be commanded by British officers.

A European power, at the close of an unsuccessful war, has often had to submit to terms little less onerous, and the condition thus made for a state did not cause it to drop out of international existence. The native states subjected to the system were commonly described as protected, and this was an accurate description, but the kind of protectorate intended by it must be carefully considered. Of course it was not that kind of veiled or suspended sovereignty which occurs in the case of a protectorate over an uncivilised region: it was a relation existing towards a state, though one enjoying what I have called another civilisation than ours. Neither was it a case in which the protected state was *represented* in its foreign affairs by the protecting one, for negotiations between the protected state and third ones were not excluded, but the protecting state was to have an opportunity of controlling them, and the protected state was not to carry them to the point of war without submitting itself to the company's decision. The two did not stand before the international society of India as forming one system, the parts of which might have different international relations, but to one alone of which it was admissible for third states to address themselves in matters concerning the international relations of either. It was a case in which the protected state was *controlled* in its foreign affairs by the protecting one[1]. And Lord Cornwallis, who in his second governor-

[1] See above, pp. 177, 178.

generalship succeeded Lord Wellesley, was anxiously desirous to remove all fear that the tie might be drawn closer by interference in the internal concerns of the protected states, beyond what might be imperatively demanded for the security of the company's own dominions.

But even this system failed to establish throughout the peninsula the *pax Britannica* which was indispensable for the secure enjoyment of quiet by the company's possessions. The next steps in advance which were taken in treaties and grants were to exclude the prince dealt with from having any connection or engagement with other chiefs or states, and even to make the sanction of the British government necessary for his having any communication with them, sometimes but not always with the exception of amicable correspondence between friends and relations—thus transforming the protectorate into one in which England became the sole representative of the native state in all external intercourse—and to bind the prince to "act in subordinate cooperation with the British Government," sometimes also to "be guided in all matters by the advice of the British agent." These steps mark the governor-generalship of Lord Hastings, which extended from October 1813 to the first day of 1823[1]. By virtue of them that administration may be singled out as the turning point in the course of shifting the affairs of India from an international to an imperial basis, although that course neither began with it nor was completed by it. The isolation of the native states was the negation of an international society, and subordinate cooperation in maintaining

[1] Lee-Warner, *The Protected Princes of India*, ch. iv. and ch. ix.; and see Tupper, *Our Indian Protectorate*, ch. ii. and ch. iii.

the *pax Britannica* implied that the peace to be maintained was the peace of the imperial state to which the cooperation was subordinate. "In 1819," Mr Lee-Warner says, Lord Hastings "raised the Wazir of Oude to the dignity of king, thus announcing not merely that the ruler of Oude no longer held his title from the emperor of Delhi, but that the British government, which had pensioned the emperor and suppressed the sovereignty of the Peshwa, could bestow a kingly title[1]." True: and the difference is obvious between such a bestowal and the assumption of a higher title by a European prince, notified by him to his fellow sovereigns, and then employed by them in their correspondence with him.

The princes whose treaties or grants dated from an earlier period were not called on, in the absence of other circumstances requiring it, to enter into new treaties or to accept new grants expressing isolation and subordination. The British government preferred to adopt on its own responsibility the principle that it was not only preponderant in India but paramount, not merely the strongest power but the rightful superior, and that all treaties and grants of whatever date were to be construed as reserving the exercise of that superiority when needed for certain beneficent purposes. There was a very large number of princes, mostly with small possessions, who enjoyed British protection without any treaty or grant; and the paramount position was equally claimed over them. Although this far-reaching principle was not inscribed in any proclamation or other public formula, its adoption can scarcely be called tacit, for it was avowed by statesmen on occasions calling for its application.

[1] u. s., p. 115.

"'We have by degrees,' said Sir Charles Metcalfe—I quote here from Marshman, vol. ii. p. 408—'become the paramount state in India. In 1817 it became the established principle of our policy to maintain tranquillity among the states of India;.....and we cannot be indifferent spectators of anarchy therein without ultimately giving up India again to the pillage and confusion from which we then rescued her.....We are bound, not by any positive engagement to the Bhurtpur state, but by our duty as supreme guardians of tranquillity, law and right, to maintain the legal succession of Balwant Singh.....Our supremacy has been violated or slighted under the impression that we were prevented by entanglement elsewhere from sufficiently resenting the indignity.....A display and vigorous exercise of our power, if rendered necessary, would be likely to bring back men's minds in that quarter to a proper tone; and the capture of Bhurtpur, if effected in a glorious manner, would do us more honour throughout India, by the removal of the hitherto unfaded impressions caused by our former failure, than can be conceived.' This advice was accepted and acted on. Lord Lake had been baffled before Bhurtpur in 1805. It was quickly taken in 1826 by Lord Combermere." Tupper, *Our Indian Protectorate*, p. 55.

The treaty of Umritsur, 16th March 1846, guaranteed the independent possession of Kashmir to the Maharaja Golab Sing. On 7th January 1848 Lord Hardinge, who had himself made that treaty, found himself under the necessity of stating to the Maharaja that "the British government are bound by no obligation to force the people to submit to a ruler who has deprived himself of their allegiance by his misconduct." And he supported that statement by saying: "Your highness is aware of the principle by which the British government is guided in its treaties with Eastern princes." That is, he construed a treaty not by its bare words, but as necessarily reserving the right of the paramount power to follow its known principles of action. The doctrine has been well put as follows: "There *is* a paramount power in the British Crown, of which the extent is wisely left undefined. There *is* a subordination in the native states, which is understood but not explained. The paramount power intervenes

only on grounds of general policy, where the interests of the Indian people or the safety of the British power are at stake. Irrespective of those features of sovereign right which native states have for the most part ceded or circumscribed by treaty, there are certainly some of which they have been silently but effectually deprived." And the latest expounder of our Indian system, who is also one of the most authorised, teaches that the treaties and grants held by the protected princes, and the precedents of our dealings with them and with the protected princes who hold no treaties or grants, must be read as a whole, like the decisions of English courts of justice, so that the principles most recently laid down are to be applied to all, and those relating to any department of conduct, as military affairs or the duties of humanity, are to be ascertained for all from the document in which that department is most fully worked out for any one—a doctrine which evidently presupposes the enjoyment of a very thorough superiority by the power to the unilateral acts of which such an effect is ascribed[1].

A paramount power such as this is defined by being, wisely or not, left undefined. That to which no limits are set is unlimited. It is a power in India like that of the parliament in the United Kingdom, restrained in exercise by considerations of morality and expediency, but not bounded by another political power meeting it at any frontier line, whether of territories or of affairs. It is in fact the power of the government and parliament of the United Kingdom themselves, and the protected Indian states may rely on its exercise towards them being confined within limits not more vaguely understood than those within

[1] Lee-Warner, *The Protected Princes of India*, pp. 37—40.

which an Englishman relies that its exercise towards him will be confined. But it exists, it constitutes the British empire in India, and it is incompatible with international relations between the princes which are subject to it, or between them and the empire. No precise date can be named for its establishment, for several reasons. Its immediate historical origin being that of a doctrine become a habit, and the habit of command being insufficient to establish a political condition without the habit of obedience, there is twice the usual uncertainty which attends the question of when a habit became fixed. And the subject is further veiled by what inevitably accompanied gradual development, namely that the forms and language befitting international relations continued to be used in many cases after such relations had really ceased. But limiting dates may be named. The empire in a strict sense, as now understood, is a distinct advance on the treaties concluded by Lord Hastings, though the rhetorical employment of the name may be found earlier. He probably foresaw the advance, for he recorded his opinion that the right of bestowing titles should be exercised direct by the British government, as an "essential and peculiar attribute of sovereign rule[1]"; but certainly the double habit referred to had not been formed in his time. On the other hand, British statesmen must have firmly held the imperial doctrine for themselves, and perhaps also have been convinced that already before the mutiny it had acquired a strong hold on native opinion, when in January 1858 they placed the so-called king of Delhi on his trial for "that he, being a subject of the British government in India, and not regarding the duty of

[1] u. s., p. 308.

his allegiance, did at Delhi, on May 11, 1857, or thereabouts, as a false traitor against the state, proclaim and declare himself the reigning king and sovereign of India, and did then and there traitorously seize and take unlawful possession of the city of Delhi, &c." And after the suppression of the mutiny not even the native princes or their subjects can have felt much doubt that the imperial doctrine had acquired practical reality. Thus the forty years from 1818 to 1858 are all, or more than all, that can be allowed for the growth and establishment of the imperial idea.

Lastly, it may be asked by which of all possible international titles England holds the sovereignty or *imperium* of India. It is not by occupation, for India possessed a civilisation placing her as far as Europe beyond the reach of any such title. It is by cession or conquest, so far as concerns the territories under direct British government; but so far as concerns those under the immediate government of the protected princes it is not by cession, for with many of them there are no treaties, and we have seen that the imperial right is claimed as overriding the letter of the treaties which there are. Neither does the right over the protected states present an ordinary case of conquest, for conquest usually operates either by the suppression of the conquered state, as in the case of Poland, or by cession when the defeated state is left in existence to make it. The imperial right over the protected states appears to present a peculiar case of conquest, operating by assumption and acquiescence.

We have now followed in outline the public relations which England has entered into in India or has assumed there. To put the case with strict accuracy, it would be necessary to describe the phases of those

relations which have been traced as being the most advanced ones that at each successive time have existed between England and any Indian states. To complete the picture of the rise of the empire, we should have also to follow the geographical advance from the forts of Bombay, Madras and Calcutta to the Suliman, Karakoram and Himalaya mountains and the frontier of Siam. If this were done we should find a system of two limits early established, and each limit thereafter constantly receding. The narrower at any date would bound the territory absolutely acquired by England, and outside the wider would be the states with which relations on a footing of equality were still entertained by her. Between the two, we should see at first forms of relation in which her preponderant power stood confessed, but these would give way to forms which acknowledged her paramount but not undefined authority, and those in turn would be replaced, or modified in their effect, by her assumption of an imperial position. The narrower limit now includes about three-fifths of the area, and a still larger proportion of the population, comprised between the Suliman range and Siam: the wider limit includes the whole, except Nepal, Bhutan, and the almost imperceptible possessions of France and Portugal. Between the two limits, more than six hundred native princes acknowledge the queen of England as empress of India; and even Nepal and Bhutan, although their relations with England are conducted on international principles, cannot be regarded as standing towards her on the same footing of political equality on which the great powers of Europe stand towards one another[1].

[1] See political equality distinguished from legal, above, p. 92. The treaty of 1816 "excluded the intervention of Nepal in the affairs of Sikkim,

But to complete in this manner the sketch which has been given would be to write history in the light of international law, and not to illustrate the theory of international relations by history. What remains for us to do with regard to the empire of India is in the first place fully to exhibit its international unity, obscured as that sometimes is by the use of language which has descended from earlier stages of its existence, and in the second place, in order that the true character of the imperial power may not be misunderstood, to indicate the boundaries which it has set to itself in dealing with the subordinate members.

The Empire of India in relation to International Law.

The empire may be said to comprise all the Gangetic peninsula except Nepal and Bhutan, and the western part of the Transgangetic peninsula. The six hundred subordinate members which are found within those limits are called in British law princes or states in alliance with Her Majesty, and the population of their dominions is described as their subjects, while the remainder of the total area is described as British India or the Indian territories under the dominion of Her Majesty, and its population as British subjects or subjects of Her Majesty. What is the

and precluded the employment or retention of British, or foreign European, or American subjects in the service of the Gurkha government without the consent of the Company :" Lee-Warner, *Protected Princes of India*, p. 98. Thus the political inferiority of Nepal to England is more marked than that of the smaller European powers, as such, to the greater. But there is no doubt that she is not included in the empire: she made her own peace with Tibet in 1856.

real significance of these appellations we shall have to consider, but they are so carefully maintained that a subject of a native prince is capable of the same process of nationalisation which is applicable to a Frenchman or a German, and, without it, does not even in British India possess the rights of a British subject.

The most important characteristic of the political condition of the native states is thus expressed in the preamble of the act of parliament which applies to them the British Indian legislation against the slave trade, st. 39 and 40 Vict., c. 46:

"And whereas the several princes and states in India in alliance with Her Majesty have no connections, engagements or communications with foreign powers, and the subjects of such princes and states are, when residing or being in the places hereinafter referred to, entitled to the protection of the British government, and receive such protection equally with the subjects of Her Majesty."

The places referred to are the high seas, or any part of Asia or Africa which the queen may specify by order in council, but this is only because the act relates to the slave trade. What is said is equally true of any part of the world, and must be so, because the power which cuts off the native princes from the communications that would be involved in self-help cannot do less than undertake the protection for which self-help is consequently wanting. With that enlargement the parliamentary recital is true at the present day of all the six hundred subordinate members of the empire, from the smallest to the greatest, whether they hold treaties or grants or depend for their position entirely on precedent or understanding, and whether or not any treaties or grants which they may hold express their position fully and correctly according to the present understanding. They have no official intercourse either with one another or with any power outside the empire.

They cannot even send representatives to Calcutta, but must communicate with the British government through the British representatives at their courts. When it is necessary to establish a course of extradition or of any other dealing between two of them, each has to make an agreement with the British government to that effect, or, according to the practice now preferred, the British government frames rules to which both the native princes are invited to consent, and for the execution of those rules each of them pledges himself to comply with the demands of the other when intimated through the resident at his court. They cannot unite in any representation to the government of India, even when having identical interests on any question, but each must approach it separately. Not only can they not receive for themselves even the commercial agents of foreign states, but they have no direct communication with the consuls or commercial agents accredited by foreign states to the government of India. They are precluded from receiving foreign decorations or even academic distinctions except through the British government, and from conferring any honours or privileges on any persons but their own subjects. They cannot employ Europeans or Americans in their service without the consent of the British government.

The particulars thus far mentioned would not be incompatible with international relations which might be represented as an extreme case of a protectorate exercised by one state over others. The native states of India might have had with foreign powers relations of their own, distinct from those of the protecting state, although entirely managed for them by the latter, as the Ionian Islands were capable of being at peace

with Russia while England, which was their protector and managed their foreign affairs, was at war with that power. It is true that consuls, though not diplomatic envoys, were accredited to the Ionian Islands, which therefore were in a position of less complete dependence than the native Indian princes would have held even had there been no more to say; but the extreme dependence of the latter would not have amounted to complete international effacement. There is however more. Not only are separate relations between England and the respective allied states substituted for any international society within the empire, but it is the settled policy of England, in negotiation with foreign powers, to treat the empire as a whole, and not to admit distinct relations of such powers to its several parts. Even the limited meaning, with which for internal purposes the term "British subjects" is employed, is occasionally relaxed for external purposes. Thus the Sultan of Muskat, by the treaty of 1873, agreed that in all treaties between him and England the words "British subjects" should include subjects of native Indian states. If this is not done, still, as in the treaty of 1874 with Yarkand, the subjects of the native states are placed on the same footing with British subjects, as a part of the agreement made with England. Foreign powers are permitted to know the native states exactly as far as the United States of America permit them to know the several states of the union, and no further. The names of either may occur among the facts with which a negotiation deals, but nothing can be concluded with them or in their name. It would be understating the case to say that the empire of India is an international unit. The true international unit, for peace or war, neutrality or negotia-

tion, is the United Kingdom and its dependencies, of which the empire of India is one. If a commercial or other treaty between England and some foreign power is not made to extend to India, that is only as it might be made not to extend to New South Wales; and this, in either case, would be only as a treaty might stipulate rules to be observed by shipping as far as a certain cape and no further.

Hence the native princes who acknowledge the imperial majesty of the United Kingdom have no international existence. That their dominions are contrasted with the dominions of the queen, and that their subjects are contrasted with the subjects of the queen, are niceties of speech handed down from other days and now devoid of international significance, though their preservation may be convenient for purposes internal to the empire, in other words for constitutional purposes. So too the term "protectorate" as applied to the empire in its relation to those princes, and the description of their subjects, when abroad, as persons entitled to British protection, are etymologically correct, but they do not bear the technical meaning which belongs to the protection of the republic of San Marino and its citizens by the kingdom of Italy, or that other technical meaning which belongs to a protectorate in Central Africa. They are etymologically correct because every state is the protector of its own people, and the United Kingdom has, for international purposes, absorbed the Indian princes and their subjects into itself. And the government of India was fully justified in the notification which it published in its official gazette, No. 1700 E, 21st August 1891: "The principles of international law have no bearing upon the relations between the government of India

as representing the queen-empress on the one hand, and the native states under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter[1]."

The Indian government itself has admitted and acted on the existence of a personal tie between the queen-empress on the one hand and the native princes and their subjects on the other hand, which might not only be described with etymological accuracy as the subjection of the latter to the former, but which is the very tie that in political language is described as the relation of sovereign to subject, whenever the history of its origin does not furnish a motive for abstaining from the use of those terms. Loyalty and allegiance as expressing the duty to the queen-empress, treason and rebellion as expressing the breach of that duty, are terms familiar in Indian official language. We have seen what were the charges on which the last of the Moguls was tried, emphatically marking as they do that the transition from an international to an imperial system in India was complete[2]. In 1875 the Gaekwar of Baroda was tried for an attempt to poison the British representative at his court, under a proclamation of 13th January 1875 in which it was said: "whereas to instigate such attempt would be a high crime against Her Majesty the queen, and a breach of the condition of loyalty to the crown under which Mulhar Rao Gaekwar is recognised as ruler of the Baroda state, and moreover such an attempt would be an act of hostility against the British government."

[1] Lee-Warner, "*The Protected Princes of India*," p. 373.
[2] Above, p. 208.

Now there was no treaty with Baroda or grant to the Gaekwar in which the condition so referred to was laid down. The Gaekwar was deemed to be subject to it only by virtue of the imperial doctrine that the position of all the native princes is to be ascertained from the principles latest adopted in dealing with any of them, as the position of all vendors and purchasers of property, or of all drawers and endorsers of bills of exchange, is to be ascertained from the latest decisions with regard to any of them. The grants (*sanads*) by which the native princes were secured in the perpetuity of their dynasties had long run in a form adopted by Lord Canning in 1858.

"Her Majesty being desirous that the governments of the several princes and chiefs of India who now govern their own territories should be perpetuated, and that the representation and dignity of their houses should be continued, I hereby in fulfilment of this desire convey to you the assurance that, on failure of natural heirs, [the adoption, by yourself and future rulers of your state, of a successor according to Hindoo law and the customs of your race will be recognised and confirmed.] Be assured that nothing shall disturb the engagement just made to you, so long as your house is loyal to the crown and faithful to the conditions of the treaties, grants and engagements which record its obligations to the British government."

For Mahomedan princes the words in square brackets were replaced by:

"any succession to the government of your state which may be legitimate according to Mahomedan law will be upheld."

Still, it might have been argued that the condition of loyalty, with the accompanying liability to punishment in case of its breach, applied only to the prince and not to his subjects; just as in the feudal system, as it existed on the continent of Europe before men's ideas of the royal power were enlarged by its beneficent operation under kings like St Louis and by the revived study of the Roman law, the vassal of a vassal owed

allegiance only to his immediate and not to his ultimate superior. But in the case of Manipur the principle which William the Conqueror established for the feudal system in England, that the whole population owes allegiance to the king in addition to the ties which may bind individuals to mesne lords, was seen in operation for the empire of India. In that case, in 1891, trial and punishment for breach of the conditions of loyalty were extended to subjects of a native state, one of whom had indeed usurped the throne but had not been recognised on it by the Indian government; and that government officially enjoined "the subjects of the Manipur state to take warning by the punishments inflicted on the persons guilty of rebellion and murder."

Mr Austin made his definition of law depend on the existence in a state of a subject part, habitually obeying the general commands issued by another part which he called the sovereign[1]. The question of ascertaining the sovereign part in the empire of India, and the more difficult one what importance should be attached to the solution if it could be discovered, may have at times perplexed the men who with high education and great practical ability have moulded that empire. But neither question was relevant externally, and internally both have in effect been happily ignored. To international law a state is sovereign which demeans itself as independent; a state is semi-sovereign to the extent of the foreign relations which the degree of its practical dependence allows it; and is non-existent if no foreign relations are allowed it. This, whatever may be the constitutional theories relating to them respect-

[1] Of course a man may individually be an Austinian subject, at the same time that he is a member of a corporate Austinian sovereign.

ively. And the empire of India has been moulded in its constitutional substance by no deduction from assumed principles of sovereignty, but by the essential conditions of peace and order in the circumstances, complied with so far as those great interests of man demanded, yet on the whole with a prudent and tender reverence for such native institutions of government as were compatible with them, and for the sentiments which accompanied those institutions and their names.

The Empire of India in relation to Constitutional Law.

I must ask the reader to bear with me if I pursue the subject of India a little further than may properly belong to a series of chapters on international law. There are some points forming a natural sequel to the line of thought which has been here pursued; constitutional points, in the sense in which that term has already been employed in this book. Wherever a body presents itself externally as a unit—whether outsiders pay an entire regard to its unity, as they do to that of France or the United States of America, or to that of the German empire so far as that empire presents itself externally as a unit, or whether they pay as little regard for the unity claimed by the body as was paid to that claimed by the Holy Roman empire during the last period of its existence—in every such case the term "constitutional" may fairly be used to express whatever political relations, possessing any degree of fixity, exist between the smaller bodies or the individual men that constitute the unit. Those relations may be guarded by definite rules applied by the regular

action of public force, or they may be guarded only by understood habits of action. Some part of them, and not always the same or a corresponding part, may be distinguished as constitutional in a narrower sense. Thus what is called the constitution of the United States is no less a set of definite rules applied by the regular action of public force than is any statute passed by congress; while in England it is understood habits of action that are usually called constitutional, in contrast to such rules. The term is used in another narrower sense when government by an absolute monarch is called unconstitutional, even although the monarchy follows understood habits of action, while government by a parliament is called constitutional, without reference to whether the parliament follows understood habits of action. But experience teaches that no term can secure for itself a settled and permanent meaning, in matters so complicated and variable as are the political institutions of men. Perhaps, in such matters, no more can be expected of a writer than that the distinctions he tries to express shall be real and important, that the terms which he selects to express them shall not violently shock current usage, and that he shall employ them consistently. On those conditions he may be read with advantage, although his terms may never become fixed in the senses which he gives them, nor does he intend that they should. A student of international relations as they are, and not as an attempt may be made to mould our conception of them by *a priori* definitions, can hardly avoid grouping together, in contrast to them, all other political relations which possess any degree of fixity; and an extension of the term "constitutional" to meet that purpose seems not to be a forced one, while any writer on the internal

affairs of an empire will none the less be free to use it in his own manner.

The first point to be noticed in this section is almost forced on us even as international lawyers, in order that we may comply with the law of thought which makes it necessary to supply a true notion in order to drive an untrue one out. We have seen that the Indian "states in alliance with Her Majesty" are not states in any international sense: what then is the constitutional sense in which they are states? In Indian political language the test which distinguishes a native state from British territory is that the former is not subject to legislation by the governor-general in council or by the legislative councils of the presidencies, or to the jurisdiction of the ordinary British courts of law. Thus, with regard to treaties in which the Company had agreed to have "no manner of concern with the Maharaja's subjects,"

"It was explained," Mr Lee-Warner says, "that the Company had guaranteed the states against the intrusion of its own courts of law, or against any extension of its ordinary jurisdiction beyond the territorial limits of the Company's possessions. But where interference and the intrusion of British jurisdiction were absolutely called for, as the only means of avoiding annexation"—because the power which protected the princes and maintained them on the throne could not be deaf to the cries which from time to time arose against their misgovernment—"the courts which were created for its exercise were established by the government in its executive capacity, and not by the legislative authorities of British India. This cardinal distinction may appear subtle, but it has been the cornerstone of the judicial system introduced into the Indian states[1]."

And with regard to certain states which were tributary to the Gaekwar of Baroda, and were taken over from him by the Bombay government, and subjected to a special system on account, not of any abuses, but of their extreme smallness, Mr Lee-Warner writes:

[1] *The Protected Princes of India*, p. 13.

"The rest of the once semi-sovereign communities are grouped under one or more political divisions called *thana* circles, over each of which a thanadar with magisterial and judicial powers presides. All of the descendants of the original chiefs conduct the revenue administration of their patches of territory on their own system, and are treated as beyond the jurisdiction of British India. But their jurisdictory powers vest for them, and by their tacit assent, in the political officers of government. The thanadars, and the British agent who supervises them, are subject to the orders of the British government but not to the jurisdiction of the High Court. The native state thus subsists, and is not converted into the British province; and the remedy applied avoids the precedent set by Rome of annexation under the plea of misrule. That which has happened in the Mahi Kanta has occurred also in Kathiawar and in the Rewa Kanta, where many talukdars who have lost their jurisdiction retain the status of native chiefs[1]."

Here also, as in the former extract, the jurisdiction of the political officers was conferred on them by British executive acts of state, and not by acts of the Indian legislatures. So too the various trials of native princes, and that of the Manipurees, have been by special commissions instituted by executive acts. But the British parliament is supreme throughout the empire, and although it does not in fact make laws to be carried into effect within the dominions of the native princes, yet the Act 39 and 40 Vict., c. 46, contains a remarkable assertion of its supreme authority. The object of that act was to extend the British Indian legislation against the slave trade to the subjects of the native princes, commensurately, as was just, with the protection received by them abroad from the British crown. And it provided that if they should contravene that legislation "upon the high seas or in any part of Asia or Africa which Her Majesty may from time to time think

[1] *The Protected Princes of India*, pp. 35, 36; and see pp. 109—112. The reader will notice the use of the term "political" established in India, meaning what relates to foreign affairs or to those of the native states. It furnishes another example of the endless variety with which we must always expect that terms relating to the doings of men will be employed.

fit to specify by any order in council," they may be dealt with as if the offence had been committed by them at any place in British India where they may be found. We have seen that while most countries apply more or less of their criminal legislation to acts committed by foreigners in foreign countries, always under the condition that it can only be enforced within the physical limits of their own sovereignties, England has hitherto refrained from doing so[1]. When therefore the enactment in question is read in the light of English ideas, it will be seen to rest on the principle that the subjects of the native Indian princes are British subjects.

This being so, the constitutional position of a native Indian state (so-called) appears to be that of a separate part of the dominions of the queen-empress, as New South Wales and British India are other such separate parts—having its local government, vested in its native prince—that local government subject both to the sovereign as executive head of the state formed by all her dominions, and to the parliament of the United Kingdom of Great Britain and Ireland as the legislative head of the same state—the authority of the sovereign as executive head applied to it through the British Indian government and the controlling department in England, both acting in that respect distinctly from their functions with regard to British India, and not limited in theory by the principles which, being carried out with them by settlers from the United Kingdom, limit that authority in colonies founded by settlement —but both the authority of the sovereign as executive head and that of parliament limited in practice by considerations pointing to the past and to the future,

[1] See above, pp. 127, 128.

respect for the long and splendid history of the princes and their peoples, and belief that under British superintendence they can be the most useful instruments of their own advancement. It is a position which, in the degree of dependence, is intermediate to those of a self-governing colony and of a crown colony. The name of sovereign is still attached to it, but really it is a position of constitutional, though not of international, semi-sovereignty[1].

In the constitutional situation thus presented British India and the native states stand in a quasi-foreign relation to one another, and we are prepared to find the legislature of the former making laws, enforceable within its limits, for observance by its proper subjects in the latter, or even outside the empire altogether. Accordingly we find the governor-general in council progressively receiving from parliament power to make laws "for all servants of the Company within the dominions of princes and states in alliance with the Company" (st. 3 and 4 Wm. 4, c. 85); "for all British subjects of Her Majesty within the dominions of princes and states in India in alliance with Her Majesty, whether in the service of the government of India or otherwise" (st. 28 and 29 Vict., c. 17); and "for native Indian subjects of Her Majesty without and beyond British India" (st. 32 and 33 Vict., c. 98). But with this there comes into combination the fact that, as expressed in the preamble to the Indian Act XXI of 1879, "by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means, the governor-general of India in council"—this time not representing the special government of British India, but as the executive organ for applying the imperial supremacy—

[1] See above, p. 89.

"has power and jurisdiction within divers places beyond the limits of British India." The authority thus exercisable by the governor-general within native states, so far as it is in the form of jurisdiction, is in some of its branches defined by certain localities, and consequently includes a jurisdiction over all persons in such localities. Examples are furnished by the houses and grounds occupied by the residents and political agents in native states (not accredited to the princes as though these were international entities)—by railways having through communication and some parts of canals—and by certain stations at which imperial jurisdiction is desirable on account of British trade, European residents, or imperial administration—so far in all these cases as the localities have not been made parts of British India, but, as is now the practice, have been left as parts of native states subject to special imperial rights. In other branches the imperial jurisdiction in question is over persons within native states, irrespective of any particular locality within them. Examples are furnished by European British subjects, who are not as a rule left to native justice, though they may be so in special circumstances, especially if they have entered the service of a native prince—by servants of the British government or of the political agent, or of any officer of the British government officially employed within the state—and by some cases in which an imperial jurisdiction, called "residuary," is exercised over certain subjects of the native states within their boundaries. In all the other cases mentioned in this paragraph the imperial jurisdiction is described as "delegated," while again the term "residuary" includes the extraordinary jurisdiction which we have already noticed as being exercised over native princes and

their subjects for rebellion, and that which is sometimes exercised over disputes between a native prince and one of his own subjects[1]. The great amount of imperial jurisdiction within the native states necessitates the appointment by the governor-general in council of justices of the peace to act within them, and thus a means is supplied by which even the British Indian legislation for its proper subjects is enforced within those states, although nothing corresponding to such enforcement would be possible in the mutual relations of two self-governing colonies. It speaks for itself that, since the machinery for the enforcement is furnished by an act of state, independent of the judicial system of British India, there can be no appeal to the courts of that system when the law offended against is British Indian, any more than when the imperial act of state introduces the law as well as the jurisdiction.

It would be quite beyond the scope of the present work to pursue in further detail the rules and practices which make up what may be called the constitutional *modus vivendi* between native Indian states on the one hand, and on the other hand the central unity and the remaining portions of the British empire. What has been said with regard to legislation and jurisdiction, though far from being exhaustive even on those topics, will serve to illustrate the distinctions relating to them which, as we have seen, are made in our public

[1] This difference of terms does not correspond to any difference in the modes by which the imperial jurisdiction was established, for both delegated and residuary jurisdictions, so called, may be found which were established by agreement with the native states, and both may be found which were established by usage. "Substituted" jurisdiction is still another term employed, and expresses the temporary administration of justice in a native state by imperial officers on account of the minority or misgovernment of the prince.

language the test of a native state as opposed to a British province in India. But it may be said generally of the *modus vivendi* that its growth has been gradual, like that of the Indian empire itself; that its particulars have in the same manner been imperceptibly shifted from an international to an imperial basis; and that the process has been veiled by the prudence of statesmen, the conservatism of lawyers, and the prevalence of certain theories about sovereignty. Veiled, but neither prevented nor retarded. The courses followed have not been devious, though the attempts to explain them have sometimes perhaps been needlessly intricate, and their now fairly complete result is consistent enough in the light of their true idea.

Has that idea been a righteous one? The point which raises the most doubt about it is the position which treaties and grants have been made to assume. Speaking of the subsidiary alliances concluded by Lord Wellesley and the terms of isolated and subordinate cooperation which were imposed by Lord Hastings, the highly authorised expounder to whom I have so often referred says with truth that "when they were fresh minted they represented different policies and different periods," but that "the action of time and of customary law has worn them down to a common value." He adds that "the same contrast is to be observed in the title-deeds creating new sovereignties which were issued in the two periods of treaty-making." And he has added in effect elsewhere that the common value to which the treaties and title-deeds of both periods have been worn down is below the face value of either[1]. It is no justification to construe a stipula-

[1] Lee-Warner, *The Protected Princes of India*, p. 119; and above, p. 207.

tion, that "the jurisdiction of the British government shall not in any manner be introduced into the principality," as referring only to "the ordinary judicial system of British India created by the legislative authority of British India," a construction which certainly could not at the time have been in the mind at least of one of the parties. Nor is it a justification to appeal to "the effect of parliamentary legislation," the foundation for which is in question. We touch more solid ground when we read that by the treaty referred to Bhopal had undertaken, in Lord Hastings's terms, to "act in subordinate cooperation with the British government[1]." Even in 1818 the ruler of Bhopal might have known that the task in which England demanded cooperation was to maintain the peace of India, within and as against attacks from without; for that purpose, to prevent gross misgovernment; to enforce toleration between Hindoo, Mahometan and Christian; to put down infanticide, suttee and other inhuman practices; and generally to raise the standard of enlightenment and civilisation. If the cooperation by which that task was to be pursued was to be a subordinate one, much was thereby left to the determination of England, in enlargement of views and choice of means. But could it be understood that the latitude allowed her reached to restricting her obligations under other clauses of the same document, or extending her empire over what was still a distinct state? It is possible that Lord Hastings foresaw that result, it is scarcely possible that he intended the treaty as furnishing a legal basis for it, and it is impossible

[1] See the reply given to the Maharanee of Bhopal, as stated by Mr Lee-Warner, u.s., pp. 331, 332.

that a native prince should at the time have so considered the treaty.

On the other side we may ask whether the treaties and grants—for the latter were in the nature of treaties so long as they were deemed to create states not subject to the empire—would have been likely to fare better if the complications, in which their strict interpretation would have resulted between European and Asiatic governments in juxtaposition, had been left to be worked out on an international basis. No part of international law has been more discussed or with less result than the limits to the obligation of treaties. No human arrangements can escape from decay. In all states the legislative power sets aside the obligation of contracts, either in regular course as by bankrupt laws, or by occasional interference when public interests call for it. Since between nations no superior authority exists to perform that function, the very conclusion of a treaty has been considered to be subject to the tacit reservation *rebus sic stantibus*, the true extent of which has hitherto defied definition. And the doctrine is taught by international lawyers no less than practised by statesmen, that although war can justifiably be commenced only for legal reasons, it may be continued in order to place the relations of the belligerents on an improved footing, which may diminish the danger of its recurrence. In no part of history has the inherent want of permanence in human arrangements been more strikingly illustrated than in that which relates the contact between European and Asiatic peoples. The methods of dealing with that contact which were tried by England, down to the imposition on the native states of the system of isolation and subordinate co-operation, were successively defeated by outbreaks of

disorder. That system did not put an end to such outbreaks, nor did experience warrant the expectation that any remedy could be complete that was not thorough in its scope and uniform in its application to the whole body of states dealt with. This must be the justification of England for securing thoroughness and uniformity by the establishment of an imperial principle, and it may be supported by experience other than her own. Russia, having the same necessities and the same aims, the peace of a continent and the elevation of its inhabitants, has been similarly led to bring all northern Asia within her empire.

In truth, the treaties and grants themselves are safer under a constitutional system than under an international one. They are no longer subject to the chance of war, from which, when it happens, the shape in which the relations of the parties may issue can scarcely be forecast. They are no longer mined by jealousy of foreigners. They are placed under the guardianship of the fellow feeling which already exists, and may be expected to increase, between all who acknowledge the supremacy of the queen-empress, and of the good faith and dislike to unnecessary innovation which in the long run mark all great nations, because without them they could not have been great. The sense in which England understands the task which has been set to her in India is at least as fixed as that in which she understands the duty of the state in her own islands, a practice now of many years' standing has settled with much certainty the restrictions which that task places on written terms, and subject to those restrictions the treaties and grants are sacred. If such a situation leaves much to precedent and constitutional tact, the princes and people of the native Indian states

may reflect that England relies on precedent and constitutional tact for her own liberty and good government. The question whether we might not with advantage make more use of written political rules has already been pointed out by leading statesmen as worthy of consideration, but thus far the just rights of all component parts of the queen's dominions, down to those of individual men, have been fairly well maintained, and it need not be feared that those of states once independent and still honoured, now that the empire has come to include them, will be less secure.

CHAPTER XI.

WAR.

The Rules of War considered as Laws.

ALL such rules or principles of action as exist among nations with regard to the conduct of war fall into two great divisions, that which relates to the action of the belligerents against one another and that which relates to the action of a belligerent with regard to neutrals. The latter of these divisions surpasses every other part of international law in the clearness with which it presents all civilised states to us as members of a society. In no other branch have the rules composing it been hammered into their present shape by so general or active a cooperation of the members of the society. Most of the international disputes which do not end in war are settled by the states between which they arise without the intervention of third parties, and though seldom without some expression of opinion by the thinking part of the world, yet often without an indication of any opinion by any government not directly concerned. But let war break out between two powers, and the whole non-belligerent world is at once related to that war as neutral, its political and commercial interests are affected by the views enter-

tained about the mutual rights and duties of neutrals and belligerents, incidents occur which oblige even the remotest state to act on some view about those rights and duties, and a general vigilance is aroused not only as to the observance but even as to the shaping of the rules on the subject. For us therefore, who take for our very idea of jural law that it is the body of rules of a society, it follows that among all generalisations that are possible on international matters the rules of neutrality are preeminently law.

But as to the mutual rights and duties of belligerents the case is very different. When third powers intervene in a war, or make their pressure felt in settling the terms of peace, they do so for political reasons concerned with the result to be attained, and not with any violation of rules of which one belligerent may have been guilty towards the other. Hence, for the rules of this class, settlement and enforcement by a society exist in a lesser degree than for any other part of international law. In treating the laws of war between belligerents as being law at all, we have little else on which to ground ourselves than that the general opinion of the international society assists in shaping the rules, and allows each party to enforce their observance towards himself if he is able to do so. But again we are met by the fact that here, of all parts of international law, the opportunities for giving a definite expression to opinion, and for a party's doing himself that right which opinion demands, are at the lowest. A belligerent may complain that his enemy has violated the laws of war, he may use measures of retorsion, but the discussion which so arises is seldom brought to any clear decision. The victory of one party, or such balance of power as may be reached between the

parties, brings to a single comprehensive close the war and every thing connected with it, the disputes which led to the war, the ulterior aims which have been developed in its course, and the recriminations to which its incidents have given rise. In drawing up the treaty of peace what is thought of is the new departure in the relations of the parties, and that departure is determined by the sword. Resentment at an act which he deems to have been a violation of the laws of war may swell the indemnity demanded by the conqueror, but the amount added on that score cannot be distinguished, the vanquished pay the indemnity without admitting the violation, and if they condemn the conduct of the war by the conqueror, their remonstrances remain wholly without effect. When in a subsequent war the temptation arises to repeat an act the lawfulness of which has been questioned in a previous war, the records of the latter furnish no pronouncement on its lawfulness which can be appealed to.

On the other hand, if we are thus thrown back on general opinion, it is fortunate that there is no part of international law which so deeply interests the majority of men, or on which therefore public discussion contributes so actively to form the general opinion of the international society, as the laws of war between belligerents. They are connected with the most striking incidents that vary the generally even current of civilised life. Those incidents excite our sympathies with the most penetrating force. Subject as so large a part of Europe is to compulsory military service, there are few men whose training does not enable them to realise more or less vividly the scenes among which they take place, and still fewer persons of either sex to whom the questions about them do not carry a

personal interest, bearing on what they may themselves have to do or to suffer, as combatants or as inhabitants of an invaded country. It may be doubted whether, latterly, the popular feeling thus stirred has always operated in the direction of humanity. In proportion as really national wars have taken the place of wars of dynastic or personal ambition, there has tended to grow up, on the conquering side in any struggle, a public impatience of all laws which might impose restraints on the fullest measure of success, which was not felt by subjects on behalf of the schemes of their rulers. But governments have in recent times done much to guide opinion in this matter. They have abstained from modes of damaging their enemies which might have been of military value, they have framed regulations for their commanders and have blamed them for excesses, they have concluded the Geneva and St Petersburg conventions, and in the conference at Brussels they have taken an important step towards the preparation of an international military code. Thus, in one way or another, laws of war between belligerents are maintained and ameliorated. In the sixteenth century almost everything was permitted against an enemy, and hardly any attempt was made to distinguish the degrees in which combatants and non-combatants partake of the hostile character. Since then, limitation after limitation has been imposed on the right of armed strength, and the improvement will be seen if we contrast the modes of conducting war at successive intervals of a century. On many points the opinion of the civilised world has become fixed, and warrants belligerents in using the means available to them for securing a practice in conformity with it.

Principles relating to Particular Military Operations.

With regard to modes of fighting and to conduct immediately connected with fighting—in a word, with regard to military operations—it is agreed that every thing is prohibited which is not of a nature to contribute to success in the operation concerned. Such is the use of projectiles which make death certain and painful, without increasing the number of men disabled by a shot; as glass, or explosive bullets of less weight than 400 grammes, in the last of which cases the convention of St Petersburg has added express prohibition to the general opinion condemning such bullets. Other examples are killing men already disabled and the sack of places taken by storm. A great progress may here be noted, for cities taken by storm have been sacked within the nineteenth century, probably not with the consent of the victorious commander in any case so recent, but because it was impossible to hold a soldiery in hand which had not yet learnt to relinquish the traditional reward of the labours of a siege.

Some things are prohibited as too inhuman by a universal agreement which cannot be entirely referred to the foregoing principle, because in certain circumstances they might possibly contribute to success in a military operation, and yet the prohibition admits of no exception. Such are the employment of poison, which was held to be unlawful even in the ancient world, and killing prisoners or refusing quarter when the fight is over, although the victorious army may be seriously hampered by the necessity of guarding a large number of able men.

It is further agreed that even where a thing does not fall under any absolute prohibition, it may only be

done in the circumstances and in the measure in which it may reasonably be expected to contribute to the success of the operation concerned. Examples are devastating a tract of country in order to prevent the enemy's occupying it or crossing it, and bombarding the parts of fortified cities which are inhabited by the civil population. It is in this connection that the employment of red-hot shot ought to be mentioned, though some theoretical writers set it down as absolutely prohibited. Red-hot shot saved Gibraltar by setting the Spanish floating batteries on fire, and it is impossible to say that it can never again be of real use. The military commander is the judge of the circumstances and the measure for things which are conditionally permitted, at the risk of being accused of inhumanity if general opinion is not satisfied with his decision.

But suppose it to be clear that the employment of a certain means is likely to contribute to the success of a military operation. Can we go further, and say that there must be a reasonable proportion between the destruction or suffering to be caused and the military advantage to be expected? This is a question which hitherto it has scarcely been necessary to ask, but which the fearful destructiveness of the most modern weapons may force on the attention. A ram or a torpedo may by one blow sink a ship with hundreds of men on board, perhaps thousands if she is a transport, and although this may have been done in a fair fight, and there must always be some military advantage in reducing the number of the enemy, still the circumstances may be such that she might have been captured instead of sunk with no great delay or damage to the operation in hand, or that even her escape would

not have been likely to lead to any serious consequences. It can hardly be maintained that such a wholesale slaughter for no adequate purpose would be justifiable. We may hope that a public opinion will be formed which, while by no means interdicting the newest methods of warfare, will recognise that a duty of self-restraint is imposed on combatants in their use.

Principles relating to the Conduct of War generally: Kriegsmanier and Kriegsraison.

We pass now to measures not belonging to any particular military operation, but which may have an effect on the war generally. Such are the bombardment of unfortified places, and the devastation of tracts of country with no special strategical purpose, the motive of either being to weaken the enemy through the loss occasioned to him, or to bring him to terms through the fear of further acts of the same kind. In order to discuss the questions thus raised it is necessary to notice a distinction often made between the ordinary rules of war (*kriegsmanier, les lois de la guerre*) and what is exceptionally permitted (*kriegsraison* or *kriegsräson, raison de guerre*), both being included in the law of war (*kriegsrecht, le droit de la guerre*)[1]. Since the distinction has not made its way into English thought, I will give it, for information and by way of caution against certain tendencies, as it has been fully worked out by Professor Lueder.

"*Kriegsraison* embraces those cases in which, by way of exception, the laws of war ought to be left without observance. This can only

[1] Rivier, in his *Lehrbuch des Völkerrechts*, uses *kriegsrecht* in the sense of *kriegsmanier*, but does not exclude the exceptional law. He says "*kriegsräson geht vor kriegsrecht*": p. 376.

happen in two cases, one that of extreme necessity, when the object of the war can only be attained by their non-observance and would be defeated by their observance, the other that of retorsion, as a retaliation for an unjustifiable non-observance of the laws of war by the other side.....

"The right not to observe the laws of war exists in the case of retorsion because, according to known maxims, non-fulfilment by one party deprives that party of the right to claim fulfilment by the other. At least this may be the case in war, where, if the violations of the laws of war by the enemy were passed without retaliation, a belligerent would be at a disadvantage and worse off than his enemy who was guilty of the violations, with reference to the end which has to be striven for by all means, namely breaking down the determination of the other side and gaining the victory.

"As little can the justifiableness of *kriegsraison* be denied on occasions of extreme necessity. If the necessity of individuals is recognised as exempting them from punishment for things never so injurious done by them from that necessity, this must be still more the case in war, since so much more is at stake. When therefore the circumstances are such that the attainment of the object of the war and the escape from extreme danger would be hindered by observing the limitations imposed by the laws of war, and can only be accomplished by breaking through those limitations, the latter is what ought to happen. It ought to happen because it must happen, that is, because the course of no war will in such extreme cases be hindered and allow itself to end in defeat, perhaps in ruin, in order not to violate formal law. No prohibition can in such a case effect any thing, or present a claim to recognition and validity; and it would be idle to formulate one, for from what commander or from what state could such heroism of meekness and renunciation be expected?

Of course such a conflict can only be of exceptional occurrence, for the laws of war are so framed by ordinary custom and well weighed conventions that ordinarily it is possible to follow them. They are built on those relations of fact which are usually met with, just as are the rules of public national law (*staatsrecht*) and private law, and in the one case as in the other only specially exceptional conditions can make it impossible to follow them. How should the laws of war, which have been laid down in order to the protection of helpless civilians, wounded and disabled soldiers, private property, flags of truce, and the maintenance of conventions which have been concluded for the protection of an occupied territory against unnecessary oppression, devastation and plundering—how should such laws be lightly unobservable? That they should be so, and that a conflict should arise between what the laws of war prescribe and what the necessity of war demands, is inconceivable except in quite extraordinary cases of exception and stress. It is therefore entirely out of the question that *kriegsraison* should be applied frequently, lightly and at pleasure, and come to be considered as standing in its practical use on the same line with the laws of war. Much rather are we dealing only

with something quite exceptionally happening, and for that reason the admission of *kriegsraison* certainly appears not to be too questionable. When however the exception happens, it excludes the rule, as its nature is to do, and *kriegsraison* takes precedence of the laws of war.

The regular normal validity of the law of war (*kriegsrecht*) is preserved by the introduction of *kriegsraison*, possible as it is only exceptionally. If this admissibleness of *kriegsraison* in extraordinary cases of necessity and exception, an admissibleness which at any rate has to be fully and decisively acknowledged, should lead one to think that there was at bottom no binding law of war, by reason of its not having to be observed in the critical cases of conflict with the demands of warfare, and that instead of a law of war there was only a usage of war in the sense condemned above (§ 52)—that would be to shoot far beyond the mark, and to ignore the final and inner cause of every law and legal institution. *Kriegsraison* is related to the law of war as necessity to criminal law, and it might be said with the same right and supported by the same argument that there was no criminal law, because its rules have not to be observed in cases of necessity. The misapprehension above referred to would lead to the one conclusion as well as to the other. Thus by the full recognition of a *kriegsraison* exceptionally justified the doctrine which has been set forth above, that there really exists a law of war and not merely a usage of war to be observed at pleasure, is not in the least altered; and as little can there be on that account any question of the right, asserted by Grotius and Pufendorff but above confuted, to free one's self from the law of war by a declaration to that effect. Even the ordinary rules of war cannot be denounced at pleasure, but only disregarded exceptionally on a few well-defined grounds. If however *kriegsraison* were considered as something outside law (*unrechtlich*) and as a breach of the law of war (*kriegsrecht*), even then the non-existence of a law of war could not follow, though such law would be liable to possible violation. For from this point of view also the state of things would be the same as in other departments of law, in all of which violations likewise occur, and indeed in some cases violations which are unatoned for and cannot be made good[1]."

Another extract from the same writer will show the principles maintained in the last extract in their application to such methods of war as those referred to at the commencement of this section.

"That ravage, burning and devastation, even on a large scale, as of whole neighbourhoods and tracts of country, may be practised where it is

[1] In Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, §§ 65 and 66, pp. 254—256.

not a question of any particular determinate result or strategical operation, but only of more general measures, as in order to make the further advance of the enemy impossible, or even to show him what war is in earnest when he persists in carrying it on without serious hope (*frivol*) and so compel him to make peace—this cannot be denied in cases of real necessity, as of a well-grounded *kriegsraison*. But it is only in such cases that it cannot be denied, and if measures of that kind are taken otherwise than under the most extreme compulsion, they are great and inhuman offences against international law[1]."

I am unable to approve of the distinction between *kriegsmanier* and *kriegsraison*. It is not wanted to justify retorsion, and must therefore be considered with reference to the ground of necessity alone. Now those who make the distinction allow the employment of every means in some circumstances, except so far as an absolute prohibition has been adopted by express convention, or rests on an ancient horror felt by mankind, as in the case of poison, to which if they were consistent their argument would equally apply. On the other hand, even the mildest means employed in war are based on some necessity, for war itself has no other rightful foundation. Little or nothing therefore seems to be gained by making two classes of measures, distinguished not really by necessity but by so vague a test as the degree of necessity, while much may be lost by the opposition in which such a system inevitably stands to any extension of the list of absolute prohibitions beyond those already existing. The two sources from which it seems possible to hope for an amelioration of the practice of war are such an extension, and a better recognition by public opinion of the duty of weighing scrupulously the degree of necessity or the amount of advantage under or for the sake of which recourse is had even to permitted measures. The immediate responsibility in the case of particular

[1] In Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, § 114, p. 484.

military operations, as with regard to the use of rams and torpedoes, lies chiefly with commanders: in the case of the wider questions relating to the conduct of a war it lies chiefly with governments. It is probable that both will be as humane as the excitement of a people feeling that a war is its own war will allow them to be, and it need not be greatly feared that Professor Lueder's own government will ever give effect to his doctrine by ordering the devastation of a whole region as an act of terrorism. That the extension of the list of absolute prohibitions need not be despaired of may be inferred from the labours of the military delegates assembled in conference at Brussels on land war in 1874. A draft declaration was adopted there, unfortunately not yet ratified by the governments represented, of which Art. 15 runs that "towns, agglomerations of houses, or villages, which are open and undefended, cannot be attacked or bombarded." Similarly Art. 32 (*c*) of the *Manual of the Laws of Land War*, adopted by the Institute of International Law at Oxford in 1880, lays down that "it is forbidden to attack and bombard localities which are not defended." The principle must equally prohibit the bombardment of open and undefended coast towns by ships, and we may fairly hope that any violation of it, either in land or in naval war, would meet with general reprobation. But a French admiral has advocated the bombardment of undefended coast towns in the British Isles in the event of a war between England and France, as a generally permissible means of exhausting the resources and weakening the spirit of an enemy, without limitation by such a condition of necessity as we have seen Professor Lueder imposing on operations of that class. The gallant officer was probably un-

aware of the support which his advice might receive up to a certain point by learned theories of *raison de guerre*, and a Frenchman might well hesitate to take a line of action against England which could not be justified by any argument that would not expose his own country and Germany, if at war with one another, to the risk of mutual devastation not of a military but of a political character. That the advice should have been given illustrates the fact that there remain in the world many relics of a less advanced moral condition, and the danger of teaching that everything is permitted to an undefinable necessity of which the party interested is the sole judge.

But however desirable may be the extension of the list of absolute prohibitions in war, care must be taken not to infer that a certain means is prohibited from the mere fact that it is not employed, when there is no reason to believe that it has been abstained from in obedience to a sentiment of right or a persuasion of law. Abstention is in itself ambiguous. An act may not have been done because the circumstances promised no advantage from doing it, or no advantage corresponding in its importance to the odium which attaches to acting harshly, even when the harshness does not exceed the limits of what is permitted. And abstention for that reason may run through a long series of years, during which the conditions of war have not been such as to tempt to the act, or during which the states which were able to do it have not been placed in circumstances which tempted to it. A change in the conditions of war then takes place by which the advantage to be obtained from the act is much increased, or the states which are able to do the act are brought by a change of circumstances within the

temptation to do it. If still it is not done, the abstention can only be attributed to a governing sentiment, and the existence of the prohibiting rule may be inferred. But what if the act is now done? There will of course be protest from the enemy, and we must see whether that protest is echoed by public opinion in third countries, and whether opinion, if adverse, is strong enough to prevent repetitions of the act when the occasion for it recurs. If it is so, the existence of a rule is established: if it is not, there is no rule, only opposing principles, which may lead to the act being sometimes done, and at other times abstained from even under strong temptation.

An illustration may be drawn from the question whether the coast fisheries of a belligerent state enjoy exemption from interference by the enemy. It has not been usual to capture the boats or men engaged in such fisheries, though no exemption has ever been claimed for deep-sea fisheries. But during the wars of the French revolution and empire the danger of invasion under which England lay was deemed to require that no means should be spared of crippling the enemy at sea, both in respect of fighting power and of transport, and accordingly the boats and men belonging to the French coast fisheries were captured. Protest followed on the part of France, as might have been expected, and continental writers generally lay down that coast fisheries are exempted from interference by the enemy, and inveigh against the non-observance of this supposed rule by England. Those writers are certainly free to advocate such principles of action as seem to them fit, but in the circumstances mentioned they cannot assert with truth the existence of a prohibitory rule.

The Treatment of the Peaceable Population, and of Private Property on Land and at Sea.

After the operations which a belligerent may undertake and the weapons which he may use, we come to the conduct which he must observe towards persons not taking part in the fighting. These may be prevented from assisting the enemy, as by giving him information or attempting to leave their abodes in order to swell his ranks. For the purpose of preventing such assistance being rendered, an invader may threaten and inflict penalties of the severity which may be necessary, but those penalties must not be connected in our minds with any notion that a crime is committed by those who, without acting treacherously, are led by patriotism to incur them. Subject to due severity being taken for their not assisting the enemy, the peaceable population of an invaded district are entitled to protection for their life, honour, family rights and religion; also for their liberty, with the exception of being compelled to serve as guides and to execute works which the invader deems necessary for his purposes; they must not however be compelled to take a more direct part in operations against their own country. As regards their property, they are entitled to immunity from pillage, but they must submit to its appropriation by an invading force, both in the form of goods, under the name of requisitions, and in that of money, under the name of contributions. Requisitions are intended for supplying specifically the wants of the invaders, as clothing, boots, provisions and forage. Contributions are described in Art. 41 of the draft declaration adopted at the Brussels conference as "equivalents for taxes, or for payments which should be made in kind, or fines."

And what fines may cover is illustrated by Professor Lueder's mentioning, in perfect consistency with recent practice, persistence in a war without serious hope (*frivol*) and "irrecusable requirements of policy," as reasons for justly levying contributions[1].

The traffic of a belligerent country by road, railway or canal is practically stopped so far as it comes in contact with its enemy, by the indirect effect of the communications being crowded by troops and supplies, and of the measures taken on each side to prevent such traffic being of assistance to the other side. To this however an exception must be made for the internal traffic of an occupied district, and for that between an occupied district and other countries, which continue as well as they can under the difficulties of the case, and subject to regulation by the invader.

So far all authorities are agreed, except as to the motives and occasions for levying contributions. And with regard to them the latitude allowed to an invader turns perhaps less on national differences than on the personal idiosyncrasies of the governments or commanders concerned, or of the writers who discuss the question, although the leaning of writers in England and the United States is towards greater mildness than seems to prevail on the continent of Europe, as is certainly the case with the practice of England and the United States with regard both to requisitions and to contributions.

But at sea the differences are more important. Notwithstanding the protests of a large number of writers and the example set by Austria and Italy in their war of 1866, the principal maritime powers continue to prohibit all commerce of their enemies so far

[1] In Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, § 117, p. 505.

as it is not placed out of their reach by being carried on in neutral bottoms, to appropriate the enemy's ships and their cargoes so far as they are the enemy's property, and to detain the seamen as prisoners. If this practice be regarded as based on a desire to weaken the enemy by impairing his resources, it is an example of a hostile measure taken with a view to success in the war as a whole, and not to success in any particular military operation. Individuals suffer, but so do the individuals from whom contributions are levied—what is a locality but a number of individuals?—and it does not seem that the practice can be consistently objected to in principle by any government which has levied contributions as "an irrecusable requirement of policy," or by any writer who has approved of contributions so levied. If again the captures by the maritime powers be regarded as intended to deprive the enemy of seamen who might serve in his military navy or in his transports, they are on the same lines as the measures which an invader employs to prevent his enemy's forces being augmented by any recruits whom he can reach. Of course the question remains whether the practice of capturing the enemy's merchant-ships is worth retaining in any case but those of breach of blockade and carriage of contraband of war, in which cases a belligerent could not expect to fare better than a neutral. Every mitigation of war of which it can be proved that it would not be dangerous to our national safety ought to be promoted, but not by means of unsound comparisons between war as carried on by land and by sea.

With reference to the course which England ought to take about the capture of an enemy's merchant shipping, otherwise than for breach of blockade or

carrying contraband, the following considerations may be submitted.

First, if policy requires England to maintain the capture, there is nothing in law to oppose her doing so. As long as the principal maritime powers uphold the claim, no rule of the international society of Europe and America can exist against it[1]. Nor is the argument against the claim more advanced if *le droit international, das völkerrecht*, be understood, not as international *law*, but as a body of *rights* believed to exist internationally *a priori*[2]. The surrender of the claim would place belligerent property at sea in a better position than it holds on land, whether we look at war as it is practised or at the doctrines of continental writers on requisitions and contributions. And the claim is not inconsistent with the relation which exists for international purposes between individuals and the states to which they belong, unless the theory of that relation be taken from the *Contrat Social* of Rousseau, in despite of the saner statements of other thinkers and of the facts of international life. But this theory cannot be discussed till some further points which bear on it have been mentioned[3].

Secondly, merchant vessels can be used as transports, and the sailors who navigate them can navigate regular transports, even if they are not fit for service in the more active part of the military navy; and in certain countries all sailors have received some training for the military navy, and are held liable to serve in it. Circumstances may therefore well arise in which not

[1] See what has been said of the special authority of the states most concerned with a particular branch of international law, above, p. 83, no. 16.

[2] See above, pp. 112—114.

[3] See below, p. 259.

merely the maintenance of England's supremacy at sea, which is so necessary for the support of her population, but even her safety from invasion, may require that an enemy's ships and sailors, of whatever descriptions respectively, should be captured and detained. It is not to be supposed that the advocates of *kriegsraison* would deny to England, under imminent danger of invasion, the right of capturing and detaining the enemy's sailors and his ships which might be used as transports: the ships and cargoes, they would probably say, ought to be released, with the men, on the conclusion of peace. The question for us is whether it is better to hold our right on its present footing, or to receive back a part of it, to be used only in our extreme need, and on the terms of accepting, along with the part, a theory hitherto strange to us, which practically reduces to narrow limits the protection given by any laws of war. I venture to think that it is better to hold our right on its present footing, even without reference to the pecuniary value of the ships and cargoes: for one reason, because when the danger of invasion was imminent it would be too late to parry it by capturing ships and men already collected in harbours ready for use; and for another, because humanity will be safer if war is governed by laws which are meant to be kept so far as prohibitive, and to be used with due self-restraint so far as permissive, than if laws of fairer seeming are laid down for it together with a licence to disregard them on the plea of necessity.

Thirdly, we have to consider whether the present right of capture agrees with the true policy of England in other respects than that of national defence. Let us imagine that she is opposed to a power or to a combination of powers at all considerable at sea, and try to

form an idea of what would then happen. Many persons appear to suppose that there would immediately be a wholesale transfer of British mercantile shipping to neutral flags, and that under the cover of these the supply of England with food and the raw materials of our manufactures would proceed much as before, only we should have lost our carrying trade. That view certainly errs by not taking sufficient account of the immense aggregate of the prices which would have to be paid for wholesale *bona fide* transfers of British ships, an aggregate far exceeding what neutral buyers could supply on short notice—of the fact that transfers which were not *bona fide* would not be valid as against a belligerent—and of the necessary consequence from those two premises, namely that an enemy would bring in the transferred ships wholesale, for inquiry by his prize courts into the circumstances of the transfers. A great rush to transfer would be followed by the discovery that war rates of insurance were heavy even under the neutral flag. And since it must be easier to convoy fleets of merchantmen kept together by the general use of steam power than it used to be to convoy fleets scattered by unequal rates of sailing, it is probable that after a little experience the British flag would still be flying over the greater part of our shipping, even were there nothing else in the case than what has yet been mentioned. It is however very possible that if England were at war with a considerable sea power, the interference with her commerce undertaken by the latter would to a large extent take place under cover of the law of blockade. It is not indeed likely that a blockade of any port in the British Isles could be made really effective, except for a short time by a rare combination of circumstances. But the power

of a steam navy to maintain a blockade is much greater than used to be that of sailing ships in the old wars between England and France—both the common law of nations and the declaration of Paris are very vague in what they require for the effectiveness of a blockade—one of the most recent blockades in history was also one of the most ineffective, that of the Confederate coast during the first year of the American civil war (for afterwards it became really effective), and yet all neutral states respected it—the respect which they paid to it was highly commendable, considering what were the issues at stake in that war, but all the same it goes to show how much more the behaviour of neutrals towards an ineffective blockade depends on political than on legal considerations—and to declare a blockade of British ports, if neutrals could in any way be induced to respect it, would have the advantage of attacking our supplies under the neutral flag as well as under our own. I have little doubt therefore that the attempt would be made, and that the behaviour of neutrals towards it would depend mainly on their political sympathies; or at least that, if it was not made, it would be because the superiority of England at sea was so overwhelming that our commerce had little to fear in any state of the law. But such an employment—abuse, if you like—of blockade would seriously weaken the motive for transferring ships to the neutral flag; and this is, to me, an additional reason for hesitating to believe in the ruin which we are told that our next great war will bring to British commerce if the existing law is maintained.

On the other hand, I do not believe at all in the capture of traders at sea as a means of breaking either the resources or the spirit of a great land power. It

was not such capture, even when reinforced by blockades admirably maintained, that brought the Napoleonic and Confederate wars to an end, but the advance of the allies to Paris and Toulouse, and that of the United States' armies to Richmond and Savannah. And the multiplication of railways makes continental states less than ever dependent on the sea for supplies. I submit then that we need neither be driven by the stress of apprehension to one solution of the question before us, nor be led by the prospect of advantage to the opposite solution. We are free to consider calmly the painful losses caused to individuals by belligerent captures—losses which it is not possible wholly to provide against by insurance, because they may ruin a trade that will not bear the insurance, and which ought not to be inflicted without adequate justification. We may also consider that capture on no other legal ground but that of enemy's property is in fact, whether consistently or not, condemned as unjust throughout a large part of Europe and America; and that England incurs on its account an unpopularity which the continental nations do not seem to incur with one another by any severity in the exaction of requisitions and contributions—perhaps because they have all acted alike in that respect, or may hope to do so, while they cannot hope to rival England in the power of capturing at sea. And the true conclusion appears to be that a real cause, when such may exist, for desiring the detention of the enemy's sailors and ships in order to prevent invasion or the loss of our naval supremacy, is the only adequate motive for maintaining the present practice; and that at the commencement of a war England should offer to her enemy to enter with him into a convention, determinable by either side on short notice,

for mutual abstention from maritime capture except under the heads of blockade and contraband.

Retorsion.

Retorsion in war is the action of a belligerent against whom a law has been broken, and who retorts by breaking the same or some other law, in order to compensate himself for the damage which he has suffered and to deter his enemy from continuing or repeating the offence. Where the same law is broken the proper term is retaliation, but there is no difference of principle between the cases, and the term retorsion covers both. The principle is justified by the analogy of national law. We have seen Professor Lueder saying: "according to known maxims, non-fulfilment by one party deprives that party of the right to claim fulfilment by the other[1]." In England a party to a contract cannot enforce its performance by the other party if he has himself failed in some performance which, either by the express terms of the contract or by what can be collected to have been the intention, was made a condition precedent to performance by the other party. A similar result is reached by Art. 1184 of the Code Napoléon, which runs that "in bilateral contracts a condition is always understood by which the contract is dissolved if one of the parties does not fulfil his engagement.... The dissolution must be sued for, and time can be given the defendant according to circumstances." The practice is that in an action under that article the court appreciates the circumstances, and only grants the dissolution in cases in which an English court would arrive at the con-

[1] See above, p. 239.

clusion that the defendant's performance was intended to be a condition precedent to the plaintiff's. Thus a principle of relativeness is acknowledged by national law even in contracts in which it is not expressed, and although the mutual duties of enemies cannot be considered as arising from contract, yet the student of ethics will admit that there is scarcely any duty which is not more or less relative. Whether then we regard the laws of war between belligerents as merely moral laws or as the laws of an international society, we must admit for them in either character a relativeness within proper limits. A state having a claim which it believes itself to be justified in prosecuting by force of arms—which is the case of every belligerent—cannot reasonably be expected to observe every rule of the game, at the risk of its own defeat or of leaving its soldiers and subjects exposed to avoidable suffering, when its antagonist has added to his original wrong by breaking the rules of the game. Nor can it be supposed that any society has adopted a law to that effect.

But the immediate sufferers from retorsion are hardly ever the persons who were guilty of the offence which called for it. This will be illustrated by an example which is worth citing, since it illustrates much else besides. During the war of 1870–1 the French detained as prisoners the crews of the German merchantmen which they captured, but the German government, in a note addressed to that of France, besides alleging illtreatment of the prisoners, objected in principle to their detention and threatened to resort to retorsion if they were not liberated. It was urged in the note that the only object of detaining seamen of the mercantile marine was to diminish the number

of sailors from whom privateers could be manned, and that therefore, since France was a party to the declaration of Paris by which privateering was abolished, it must be supposed that she had sanctioned the enjoyment thenceforth by such seamen of an immunity from detention. The Count de Chaudordy, who was minister of foreign affairs in the "government of national defence," rebutted the inference drawn from the declaration of Paris by pointing out the services which merchant seamen are still capable of rendering in war at a moment's notice, and that the reasons for their detention were of double force as against Germany, in which all seafaring men are subject to conscription for the navy of the state. The German government, in execution of its threat, sent forty notables from Dijon, Gray and Vesoul as prisoners to Bremen. The war closed without either of the conflicting claims being withdrawn, and the seamen and the notables were released in consequence of the peace. Subsequent German writers, as Geffcken and Lueder[1], uphold the rule propounded by their government, that mercantile seamen cannot be detained as prisoners, while the writers of other nationalities generally maintain the old rule that they can be so detained.

This incident strikingly exemplifies the want of definition which, as already remarked, the laws of war between belligerents suffer in consequence of the usual absence of any clear pronouncement on alleged breaches of them. With regard to the reasoning employed by the German government, since the

[1] Geffcken, note 8 to § 126 of Heffter's *Europäische Völkerrecht der Gegenwart*, 8th edition, p. 279: Lueder, in Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, § 113, note 6, p. 479.

detention of merchant seamen was admitted to be lawful before the declaration of Paris[1], those who think of laws as the rules of a society cannot hold that it became unlawful by a mere inference from that declaration unless the international society was in some way committed to the legitimacy of the inference. It might have been so committed by the general opinion of writers, expressing that of European and American men, only in the case before us the inference was supported by no such general opinion, and was not likely to be so[2]. And if it were common for governments to act on inferences or opinions not heard of until propounded for use on the occasion, and then disputed, it would be absurd to speak of any laws of war at all as between belligerents. What Selden said of the English system of equity while it was in process of development, that it was as if you were to take the measure of length from the chancellor's foot, might be applied to any assertion that could be made about the lawful conduct of war. And lastly we remark the lesson for which the incident was cited, that the notables of Dijon, Gray and Vesoul suffered by retorsion for an offence which, if it was one, was not theirs. On that score however no reasonable objection can be made, and we must see why.

That it should be deemed just for an individual to suffer by retorsion for the offence of his government implies that for the purposes of war he is held to be identified with his state. Retorsion may even imply a double process of identifying an individual with his state, for it may be employed or threatened in reply

[1] This is not admitted by those who adopt Rousseau's theory of the relation of individuals to war, as to which see below, p. 259.

[2] See above, p. 84, no. 17.

to something which has not been done by the enemy's government, and which that government may have been unable to prevent. In that case the responsibility is first carried up to the state by the identification with it of the individual who has done the wrong, and then the suffering for the wrong is brought down to another individual by identifying him in turn with his state. In no other way can the relative character of the laws of war be made to support the practice of retorsion. No analogy that can be drawn either from ethics or from national law will warrant any one's being deliberately made to suffer for the fault of another from whom he is regarded as distinct. There can be only one reason why the notables of Dijon, Gray and Vesoul could justly lose their claim to the fulfilment by an invader of his duties towards the peaceable population, because France had failed to release German prisoners, supposing that she was bound to release them. It is that all claims of Germany against France were claims against the notables of Dijon, Gray and Vesoul among other French citizens, not indeed to be pressed against those individuals without adequate occasion, but giving a relative character to their claim to a certain treatment by the invader, and therefore superseding the latter claim on adequate occasion arising.

The same result will follow if retorsion be placed on the ground of necessity. We have seen that Professor Lueder, justifying *kriegsraison* on that ground, says that "the necessity of individuals is recognised as exempting them from punishment for things never so injurious done by them from that necessity[1]." That statement goes too far, both for ethics and at least for English law. It is true that homicide is excused by

[1] Above, p. 239.

the necessity of defending yourself against an attack by the person killed, but it is not justifiable to kill some one who has not attacked you, in order to throw on him, rather than bear yourself, the consequences of a fatality in which neither was at fault[1]. If therefore the analogy be truly weighed, it will appear that the admission of necessity as a ground for retorsion presupposes that those on whom the burden is made to fall are regarded by international law as sharing the faults of their state. And the same is true of all the burdens which the laws of war allow to fall on individuals. Neither requisitions nor the exaction of the most moderate contributions can be explained unless the subjects of the enemy state be in some way identified with their state.

The General Theory of the Relation of Subjects to a War.

The way has now been cleared for considering from a general point of view the relation of subjects to a war carried on by their state. Are they parties to the war? are they simply strangers to it? or in what intermediate relation to it are they placed? In the middle ages the answer did not seem doubtful: the subjects were parties to the war, and not only were they enemies of the state with which it was waged, but the subjects of the two states were enemies one of another as individuals. If the state was a feudal one, the tie of personal allegiance had for its consequence that all the quarrels of its lord were also the quarrels of his men: those who had defied the lord or whom he had defied—put out of faith—were thereby out of

[1] See above, p. 111.

faith with the homage. If it was an Italian or other republic, the citizens felt that they were themselves the state; it had not occurred to them that from the personality and relations of the latter their own personality and relations were to be distinguished. This view of war led to great savagery. The life and property of every individual member of each belligerent state was legally exposed to be taken or pillaged by every individual member of the other belligerent state, and on a declaration of war it was usual to incite all subjects by proclamation to attack and spoil the enemy by every means in their power (*courir sus aux ennemis*).

In the middle of the eighteenth century, when a great improvement had already been made in the practice of war, an attempt was made to place its theory at the opposite extreme by a sudden transition. Rousseau wrote, in his famous *Contrat Social*:

"War is not a relation of man to man but of state to state, in which individuals are enemies only accidentally, not as men nor even as citizens but as soldiers, not as members of their country but as its defenders. Lastly, a state can only have other states for enemies and not men, seeing that no true relation can be established between things of different natures[1].

The levity of mind displayed by such a passage is extraordinary, even for a man of Rousseau's character. If no true relation can be established between states and men, it must be impossible for men not only to be the enemies, but also to be the citizens or members of a state, which in the same passage they are described as being. And if it is only as soldiers that men are enemies even accidentally, every measure employed in war with reference to the civil population, including the most moderate requisitions, contributions and inter-

[1] *Contrat Social*, bk. I. ch. 4.

ferences with their liberty, must be unlawful. That legal situation would make war almost impossible; a result which Rousseau would probably not have regretted, but if he had intended it he would have mentioned it: he had thought so little about what he was writing that he did not see it. As little had he reflected that the power of creating corporations with limited liability may well be granted to individuals by states, which can impose the conditions and exercise the control necessary to prevent injustice, but that ethical principle must condemn the claim that men, acting in groups not subject to regulation by a superior, can repudiate their personal responsibility, and leave outsiders to seek their only satisfaction from the means with which they have chosen to clothe the group.

In 1801 M. Portalis, in his discourse on the opening of the French prize court, made the more moderate pronouncement that "war is a relation of state to state and not of individual to individual." It will be observed that this expressly negatives only the doctrine that the subjects of two belligerent states are enemies one of another as individuals. It leaves open the question whether the subjects of each state are not responsible to the other, and therefore in war its enemies; in other words, whether the theory of war does not require that for its purposes the subjects of a state shall be identified with it, as I have put it in speaking of the principles of retorsion and necessity. Consequently the pronouncement of M. Portalis, while justly incompatible with pillage, is not incompatible with any of the practices that in the nineteenth century are still usual. But the arbitrary assertions of Rousseau continued to exercise the fascination which extreme

doctrines seem to possess, especially when an end is to be served by them; and Napoleon prefaced as follows a decree of 18th November, 1804: "considering that England does not admit the law of nations universally followed by all civilised peoples, that she reputes as an enemy every individual belonging to the enemy state, and consequently makes the crews of merchant ships prisoners of war." Thus the emperor bettered the philosopher by asserting for their views a universal agreement, both in theory and in practice, with the single exception which to so many minds seems to carry a comforting assurance of their own superiority. We have seen however that when Bismarck reproached the French for doing the same thing which Napoleon considered to take the English out of the list of civilised peoples (*peuples policés*), he used neither the authority nor the same argument, but practically repudiated both by basing his claim on the later declaration of Paris[1].

The general view which Professor Lueder takes of the relation of subjects to a war is in accordance with that which has here been intimated. He quotes Portalis with approval, and says that "in war only states and not private persons are opposed to one another as enemies," a maxim which is equivalent to that of Portalis and leaves the same point open[2]. And that he perceived and intended the lacuna in the maxim, whether Portalis did so or not, may be seen from another passage in which he fills it as follows.

"The commencement of war and the entry of the law of war on the scene introduce for the subjects of the belligerent states the condition

[1] Above, p. 254.

[2] In Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, § 69, p. 265, with note 5 on p. 267.

of war (*kriegstand*), that is, the special relation which in consequence of the outbreak of war arises between them and the opposite party. All the subjects of the states which are at war are under that condition, though not in the same degree, notwithstanding that the rule holds that peaceable private persons belonging to the belligerent states are not mutually enemies. For even those who take no part in the operations of war have to bear, in the measure of what has above been established in general and in the following pages will be carried out in detail, certain burdens, restrictions, sacrifices, disadvantages, in one word duties towards the hostile state, which war naturally brings with it[1]."

And a few lines further on the same writer describes the peaceable population as being "enemies in the passive sense[2]."

The notion of duties towards an occupying invader which is thus adopted by the learned professor, and not by him alone, appears to be open to grave objection. It brands as criminal acts done by the invaded population, or by individual members of it, which are only deserving of praise as patriotic, whatever may be the right of the invader to repress them in his own interest, or even in that of the quiet of the occupied district. The limit of what patriotism may justifiably attempt in such cases is not the quiet of the occupied district in particular, but the real good of the country at large, and humanity will be better respected if the necessary repression is exercised with a regretful consciousness of the interest in which that is done, than if the invader tries to cover his interest by the pharisaical assumption that he is punishing guilt. The steps which must be taken against the peaceable population can properly be put only on the ground of their being enemies, as Professor Lueder calls them after all, though with evident reluctance. And so the *a priori* school seems to have arrived at last at the same point which we have reached inductively, by enquiring

[1] *Handbuch des Völkerrechts*, vol. 4, § 90, p. 371. [2] *Ib.* p. 372.

what view of the relation of subjects to a war is implied by retorsion and necessity as admitted principles of action. To sum up:

First, war is undoubtedly a relation of state to state, whatever else it may be as well.

Secondly, war establishes between each of the states which are parties to it and the subjects of the enemy state a relation which entitles the former to treat them as identified with their state, in other words as enemies, so far as the necessities of war require, under the limitations which are recognised as being imposed by humanity. This measure is different for combatants and for the peaceable population, as the necessities and limitations referred to are different for them, but the difference does not arise from any absence in the one case of a relation existing in the other. The men who form a state are not allowed to disclaim their part in the offences alleged against it, whether those on account of which the war was begun or those charged as having been committed by it in the course of the war, or therefore to claim that hostile action shall not be directed against their state through them in their respective measures. And this is just. Whatever is done or omitted by a state is done or omitted by the men who are grouped in it, or at least the deed or the omission is sanctioned by them. That must be so, because a state is not a self-acting machine. The impulse which its wheels receive can only be a human impulse, its rulers can employ only human agency, and that agency must at least tacitly consent to be so employed. But if we look more closely at the facts we shall probably find that in the foreign affairs of a state the rulers oftener act under the impulse of the mass than by its tacit permission, and that tacit per-

mission is seldom conceded by the mass except to those who embody and represent the national character.

Thirdly, war establishes no direct relation between the members of the respective belligerent states, and in that sense it is true that war is not a relation of individual to individual. The personalities of a state and of its subjects are distinct; the duties, engagements and liabilities of the former are not the duties, engagements and liabilities of the latter; but the latter are responsible for those of the former. To use the analogy of private law, a state may be described as a corporation or technical person, though not as one with limited liability. The limitation by the laws of war of the hostile action which may be taken against an individual is analogous, not to any limitation in private law of a shareholder's liability for the debts of the incorporated company in which his shares are held, but to the joint effect in private law of the principle that the incorporated company must be the primary object of attack, the shareholders' liability even though unlimited being only subsidiary to that of the company, and of whatever limitation the law may have imposed for the sake of humanity on the execution to be obtained against a debtor in any case. So much protection as a subject derives in war from the distinction of personalities between him and his state is an advance on the views practically entertained in the middle ages, and it includes the prohibition of pillage and of all fighting not directed by public authority.

Humanity in War.

It is often said that where in war the principle of necessity conflicts with that of humanity, the former

must prevail, or, as Professor Lueder puts it, that humanity must be considered only so far as the nature and end of war permit[1]. That maxim is not intended to impair the absolute prohibitions which are among the laws of war, as that of employing poison. Its purport is to warn governments and commanders that, with regard to acts of which the admissibleness depends on occasion and measure, they must for the sake of humanity itself let necessity go before it in judging of occasion and measure. And it may, in cases of retorsion, require that severities shall be exercised against persons who, being already in the power of their enemy, would by the laws of war be exempt from severities otherwise than in consequence of their own conduct. It has been said that such severities may even go to the length of death, regardless of the absolute prohibition which in this age the laws of war pronounce against killing prisoners; and the instance has been cited of the commander of insurgents, morally entitled by their strength and organisation to be treated as belligerents, threatening to execute a prisoner for every one of his own men who should be executed for treason. That case however is, by the hypothesis, one in which the laws of war, whether rightly or wrongly, have not been admitted to apply. It is not within the scope of the present book to discuss what insurgents may do in order to force their entrance within the protection of regular war, but in dealing with regular war it behoves us not to weaken, by any exception whatever, the few absolute prohibitions which its laws contain.

With regard to things which are permitted when due respect is paid to occasion and measure, it is

[1] In Holtzendorff's *Handbuch des Völkerrechts*, vol. 4, § 71, p. 276.

alleged in justification of the maxim which we are considering that true humanity is to bring the war to the speediest conclusion, and that this is best done by the sternest interpretation of the license given by necessity. If it were put forward as a benefit for mankind that all wars should be decided by the first year or the first campaign, much might be said against such an opinion. The premium on preparation would be enormous, and suffering not beneath comparison with that caused by war would be caused by the grinding taxation necessary for the preparation which every state would be compelled to maintain. The most aggressive powers, and therefore those the least entitled to succeed, would generally be the best prepared and therefore the likeliest to succeed. Even perfect readiness would scarcely be thought to give sufficient security without alliances, and alliances by which large parts of the world are divided into opposing camps are apt to lead to war though intended for defence. But such general considerations can have no effect on the conduct of a particular war. Once engaged in a war, all governments and commanders must feel it a duty to their own people to bring it as soon as possible to a successful conclusion, and for that purpose they will certainly give necessity precedence over humanity in all things permitted. It is as much as can be expected if they abstain from causing very great suffering by acts of which the effect on the fate of the war can be but small. The best hope for the mitigation of war lies in fencing as far as possible by a prohibition every point at which the temptation to inhumanity is excessive.

There is one class of rules which it seems particularly important to lay down in a manner admitting of

no exception, namely those which relate to the rights of persons engaged in fighting or in contact with it, whether as combatants or in the service of the sick and wounded. To permit exceptions is to create uncertainty, and amid scenes of carnage and devastation all uncertainty of personal position tends strongly to brutalise those who are exposed to it. Let the conditions to be satisfied for the admission of irregulars to the rights of soldiers, or for the enjoyment of immunities by those who render philanthropic services, be made as stringent as real military necessity may require, but when the conditions are satisfied let the rights and the immunities be absolutely inviolable.

The Improvement of the Laws of War.

It is almost a truism to say that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that duties arising out of that larger citizenship are owed even to him. This sentiment has never been wholly wanting in Europe since the commencement of historical times, but there have been great variations in the nature and extent of the whole to which the wider attachment was felt. It was felt in a Greek city for the Amphictyons, and ultimately for the Hellenic race. In the later days of the Roman republic and the earlier ones of the empire, the Stoic philosophy made the commonwealth of mankind an object of reverence to men of cultivation. Then Christianity, by which I do not mean what its founder taught but the system which existed, substituted the Holy Catholic Church as the all-embracing

community which chiefly occupied the thoughts of the faithful, though the claims of mankind were not denied; and if it practically narrowed the circle of interest, it made a compensation by the greater force of the motives which it called into play. In our own time there is a cosmopolitan sentiment, a belief in a commonwealth of mankind similar to that of the Stoics, but stronger because the soil has been prepared by Christianity, and by the mutual respect which great states tolerably equal in power and similar in civilisation cannot help feeling for one another.

We might have expected that, in each of the forms which it has assumed, the feeling of a larger citizenship would have had more effect in mitigating the practice of war than it would seem to have had. Especially we should have expected that the introduction of a new form by philosophy or religion would have marked an era in that practice. We find on the contrary that the progress of war from utter savagery to its present quasi-civilised condition has been slow and gradual. The first energies of a philosophy or a religion, from the ardour of which much might have been hoped, have spent themselves in obtaining its general acceptance; it was not in a position to determine the action of rulers and armies until it had been absorbed to a large extent in the steady current of human motives. That current, purified and deepened by the contributions which philosophy and religion have from time to time poured into it, has gone on raising by imperceptible degrees the standard of action in war as well as in peace. There have been periods during which the level has fallen, and one such period it belongs to our subject to notice. The wars of religion which followed the Reformation were among the most

terrible in which the beast in man ever broke loose, and yet they occurred in an age of comparative enlightenment. Zeal for a cause, however worthy the cause may be, is one of the strongest and most dangerous irritants to which human passion is subject; and the tie of Protestant to Protestant and of Catholic to Catholic, cutting across the state tie instead of embracing it unweakened in a more comprehensive one, enfeebled the ordinary checks to passion when they were most wanted. Such a degradation of war would tend to recur if socialism attained the consistency and power of a militant creed, and met the present idea of the state on the field of battle. It is possible that we might then see in war a license equal to that which anarchism shows us in peace.

It is more agreeable to dwell on two periods of history during which the mitigation of war has advanced by unusual strides. One is the age of chivalry, when a number of influences, which it would be beyond our purpose to trace, combined to raise the warrior's regard for his personal character and moral dignity. The result was a temperament largely coloured by pride and self-respect, and most conspicuously developed in the knights and squires, but not wanting in the fighting men of other ranks. They gloried in its possession, and were determined to preserve it from contamination by anything which they deemed to be mean or derogatory. Often indeed their standard was capricious, as when the English thought that even strategy was beneath military honour, and complained that the French would not meet them at a set place and time. But to chivalry much is due in the improved treatment of prisoners which it brought about, and in the deep root taken by the idea of fair

fighting, as in not covering yourself by using the enemy's flag or uniform in combat. It needs no proof that some tincture of the chivalrous temperament has been at all times the good side of the warrior's character, or that it is likely to be produced by the habit of confronting danger, especially when combined with the habit of command. It seems however that the enjoyment of a classical age is necessary in order that a virtue, attaining its full power and recognition, may afterwards take its place in the due proportion of things; and it is remarkable that the same age was classical in Europe, through the early friars for Christian humility, and through the knights for the lofty scorn of chivalry. But what is excessive may be trusted to perish, and it was probably very much due to the impulse given by chivalry that, notwithstanding the savagery of the wars of religion, the directing classes in Europe were so prepared that Grotius could propound his corrections (*temperamenta*) for the laws of war with a chance of being listened to[1].

The lesson which we may derive is that the best hope for the further mitigation of war lies in a high standard of character being maintained among soldiers. In peace considerations of law and justice may be acted on by nations, and the action taken on such grounds will in its turn help to mould the character. In war the stress is such that no considerations can be relied on for determining action but those which are already incorporated in the character. The determination of action in war lies practically with two classes, commanders by land and sea and statesmen: the people, once excited enough for war to have broken out, will approve of any measures which their

[1] See above, p. 46.

commanders and statesmen recommend for carrying it on. And of those two classes the commanders are much the more important for our present purpose, because their opinion of what necessity requires will influence the statesmen. The best chance that interference with an enemy's commerce at sea, except in the cases of blockade and contraband, should be limited to what may be strictly necessary for national defence, is that English and French naval captains should come to think interference with it beyond that limit derogatory, not that argument should be more successful than it has been in making out a difference in principle between that and other methods of carrying on war. And those are mistaken friends of humanity who, by decrying the military and naval professions, do their best to keep good men out of them, and thereby to lower the standard of their character.

The second period during which the mitigation of war has advanced with unusual rapidity is that in which we live. Within the nineteenth century cities taken by storm have been rescued from pillage and outrage; the treatment of invaded countries, severe as it still is, has become mild in comparison with what it was during the Napoleonic wars; privateering has been abolished over by far the larger part of the world, and the rest of the world is prepared to accede to its abolition if the declaration of Paris should be extended by placing private belligerent property at sea on the same footing as that of neutrals; Austria and Italy, in their war of 1866, have set the example of that extension, in concurrence, it must be admitted, with plain self-interest, and no necessity of national defence opposing; the Geneva convention has protected those engaged in the care of the sick and

wounded, and the convention of St Petersburg has prohibited a certain class of cruel explosives. The cause of this rapid career of improvement must be something more than the renewed belief in a commonwealth of mankind which has been mentioned above as marking our time. If that belief had stood alone, it might have done no more for the mitigation of war than was done by it when it was first introduced by the Stoic philosophy. But along with the renewal of that belief there has come a remarkable development of the sentiment of pity, of an enthusiasm of humanity which has caused a wider and keener sympathy with suffering than has perhaps ever before been known. As in the case of chivalry, I do not enter into the difficult enquiry as to the influences to which the phenomenon is due: it is sufficient for students of international law to note the fact. No doubt the enthusiasm of humanity and the recognition of a human brotherhood are closely allied. They are indeed the emotional and intellectual aspects of the same psychological attitude, but history proves that they may be developed in different degrees, and the latter is of course the weaker of the two for any operative purpose. Thus, to take our examples only from the nineteenth century, the intellectual recognition of a duty to mankind has failed to establish prohibitive rules where there has been no great suffering by individuals to excite pity. To destroy a harbour which a belligerent has not the means of effectually blockading has been represented with justice as a crime against the world, but the protests of opinion have not prevented the attempt from being made in the American war of secession and by Russia at the mouth of the Danube in her last Turkish war.

And now there are ominous signs that pity, as an operative force in the mitigation of war, has nearly reached its limit. The Geneva convention is probably secure, so far as concerns the protection afforded by it to the enemy, including the peaceable subjects of the enemy, in tending their own sick and wounded. But so far as concerns the Red Cross societies which flock from neutral countries to perform works of mercy on the field of battle, since their tendency is to assist the weaker party by relieving him from the necessity of attending to his own sick and wounded, it is impossible for those who hear what soldiers say about them to feel sure that the stronger party in a war will always allow them free course. Theoretical writers have been found to preach what at one time they had been unanimous in denouncing, the devastation of whole tracts of country for sheer terror, or in vengeance for stubborn resistance by the enemy. And the bombardment of undefended coast towns has been advocated by professional sailors, without restriction to the case of their containing important magazines, which forty years ago was felt to be the only justification for the bombardment of Odessa, and was not universally admitted as a justification. The pity which is effectual to work great changes is that which, in running at once through millions of men, is intensified by the enthusiasm which masses engender. But pity for suffering in war is liable in democratic times to encounter other feelings of equal extent and opposite tendency, the consciousness that the war in which the nation is engaged has been willed by it, and the national determination to triumph at any cost.

What has been said in this section may be useful to the student of international law by leading him to

reflect on the conditions under which he has to work for its amendment, especially with regard to war, but it is not meant to discourage him from that work. That international law is less certain than national law is often made a reproach to it, necessarily as that consequence flows from there being no legislature to enact it and no judicature to declare it. The student of international law may to some extent console himself with the reflection that legislatures and judicatures, by the very fact of their fixing the law, are sometimes a hindrance to its improvement. In their hands, if they are too conservative, the process of development may be arrested; the living tissue of the law may become ossified; while if a branch of law is still free to develop itself under the influence of public opinion, the student has the power, and with it the responsibility and the privilege, of assisting in its evolution. Two objects to be attained have been already indicated: as to law, the extension of the list of absolute prohibitions, so that methods of warfare which are still approved or faintly condemned may gradually be brought under a ban along with poisoned weapons and explosives weighing less than 400 grammes; as to practice, an increased sensitiveness to the guilt of using even a permitted method when the suffering that must result is out of any reasonable proportion to the military advantage promised. Obviously also, in cases of the latter kind, a step is gained whenever it is found possible to reinforce the sensitiveness of conscience by a better definition of the occasion and measure on and in which alone a certain method is permitted. But in this there must always be extreme difficulty, as may be seen in the little success which has attended the attempts to limit requisitions and contributions. And

where the problem cannot be satisfactorily solved, it is safer in my judgment to abstain from laying down a rule, and to appeal as strongly as the case admits to the highest principles of action, than to proclaim a rule and permit necessity to be pleaded for breaking it. The plea of necessity, even when justified, has a dangerous tendency to corrupt and degrade those who urge it; and when it has sapped the foundations of one fence, no other fence into the construction of which it has been introduced can be greatly relied on.

Cambridge:
PRINTED BY C. J. CLAY, M.A. AND SONS,
AT THE UNIVERSITY PRESS.

The borrower must return this item on or before the last date stamped below. If another user places a recall for this item, the borrower will be notified of the need for an earlier return.

Non-receipt of overdue notices does ***not*** *exempt the borrower from overdue fines.*

Harvard College Widener Library
Cambridge, MA 02138 617-495-2413

Please handle with care.
Thank you for helping to preserve library collections at Harvard.